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IN THE

# Supreme Court of the United States

CF INDUSTRIES, INC.,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To the U.S. Court of Appeals For The Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether this Court's decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998) – which held that that the Harbor Maintenance Tax (HMT) is a tax and not a user fee – forecloses the court of appeals' decision that the HMT is a user fee and not a tax, and therefore not governed by the Uniformity Clause of Article I.

2. Whether the HMT statute violates the Uniformity Clause requirement that "all Duties, Imposts and Excises shall be uniform throughout the United States," by imposing a tax on certain types of port use in all of the coastal states except Alaska and Hawaii, where such port use is tax exempt.

3. Whether the HMT statute's tax exemption for port use in Alaska and Hawaii violates the Port Preference Clause of Article I, which forbids Congress from granting express preferences in revenue laws for all of the ports of any state.

## RULE 29.6 DISCLOSURE

Petitioner CF Industries, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

This case calls on the Court to review the constitutionality of the provisions of the Harbor Maintenance Tax (HMT) that remain in effect following the Court's decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). In *United States Shoe*, the Court held that the HMT imposed with respect to export cargo was a tax, and not a user fee, and therefore subject to the Export Clause prohibition that "[n]o Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. The provisions of the HMT statute that do not apply to exports, and therefore were not reviewed in *United States Shoe*, still assess approximately $500 million in HMT each year on cargo unloaded at the nation's coastal seaports, following shipment from other states and foreign countries.

In the U.S. Court of Appeals for the Federal Circuit, Petitioner CF Industries argued that the HMT on cargo unloadings violates the Uniformity Clause of Article I, by imposing a tax on certain types of port use in all of the coastal states except Alaska and Hawaii, where such port use is tax exempt. CF Industries maintained that the exemption for Alaska and Hawaii violates the longstanding Uniformity Clause requirement that a tax must "apply, at the same rate, in all portions of the United States where the subject of the tax is found." *United States v. Ptasynski*, 462 U.S. 74, 84 (1983). The court of appeals never reached the merits of CF Industries' argument, however, because it held that the Uniformity Clause does not apply to the HMT. Notwithstanding this Court's decision, in *United States Shoe*, that the HMT is a tax and not a user fee, the court of appeals held that the HMT is a user fee and not a tax for purposes of the Uniformity Clause, and therefore outside the scope of Uniformity Clause requirements. The court of appeals also rejected CF Industries' claim that the tax exemption for port use in Alaska and Hawaii violates the Port Preference Clause

of Article I, which forbids Congress from granting express preferences in revenue laws for the ports of any state.

CF Industries now respectfully petitions this Court to review the Federal Circuit's judgment, which because of that court's exclusive jurisdiction now stands as the law of the land with respect to these constitutional provisions as applied to the revenue laws administered by the U.S. Bureau of Customs and Border Protection.

## OPINIONS BELOW

The opinion of the Federal Circuit (Pet. App. A2-20) is reported at 340 F.3d 1355. The opinion of the U.S. Court of International Trade (Pet. App. A21-23) is not reported.

## JURISDICTION

The Federal Circuit's final judgment was entered on August 18, 2003. (Pet. App. A1.) On November 10, 2003, the Chief Justice granted an application for extension of time to file this petition on or before December 16, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Appendix (Pet. App. A26-35) sets forth verbatim the following statutory and constitutional provisions: 26 U.S.C. §§ 4461-4462; U.S. CONST. art. I, § 8, cl. 1; and U.S. CONST. art. I, § 9, cls. 4, 5 and 6.

## STATEMENT OF THE CASE

This case presents the question whether the Harbor Maintenance Tax (HMT) imposed on unloadings of commercial cargo is unconstitutional. The HMT statute exempts certain types of unloadings from the tax if they occur in the ports of Alaska or Hawaii, but the same types of unloadings are taxed if they occur in the ports of any of the other coastal states. 26 U.S.C. § 4462(b). The issue here is

whether this exemption for Alaska and Hawaii violates the Uniformity Clause of Article I (which requires taxes to be geographically neutral) or the Port Preference Clause of Article I (which forbids taxes that give an express preference to the ports of one state over the ports of another state).

### A. The Harbor Maintenance Tax

In 1986, Congress enacted the HMT to raise new revenues to fund the development and maintenance of the nation's harbors, which had traditionally been funded through general tax revenues. The HMT statute imposed the tax on "port use," defined as "the loading of commercial cargo on, or . . . the unloading of commercial cargo from, a commercial vessel at a port." 26 U.S.C. § 4462(a)(1). The HMT statute imposed the tax on loadings only if the pertinent cargo was "to be exported from the United States." *Id.* § 4461(c)(2)(A). The tax on unloadings was imposed on any cargo shipments unloaded at a coastal port, regardless of whether the shipments originated inside or outside of the United States. *Id.* § 4461(c)(2)(B). The amount of tax owing was a fixed percentage of the value of the cargo loaded or unloaded. *Id.* § 4461(b). The U.S. Customs Service (now Bureau of Customs and Border Protection) was charged with the responsibility to administer and enforce the HMT statute.

Petitioner CF Industries is a fertilizer manufacturer that pays HMT on the phosphate fertilizer that it unloads in Davant, Louisiana, following shipment from East Tampa, Florida. CF Industries has paid hundreds of thousands of dollars in HMT for unloadings of fertilizer at Davant during the period at issue in this case.

### B. The Harbor Maintenance Tax on Cargo Loadings and the *United States Shoe* Case

Beginning in the mid-1990's, thousands of exporters filed separate civil actions in the United States Court of

International Trade (CIT), challenging the constitutionality of the loadings tax on export cargo under the Export Clause of the U.S. Constitution, which provides that "[n]o Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. The action filed by United States Shoe Corp. was selected as a test case to resolve the Export Clause issue. Following a decision by the CIT and an appeal to the U.S. Court of Appeals for the Federal Circuit, this Court held that the HMT on loadings was an unconstitutional export tax. *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). It is critical in the present case that this Court's *United States Shoe* ruling rested on the conclusion that the HMT is a "tax" subject to Export Clause prohibitions and not a "user fee." *Id.* at 369.

### C. This Litigation

#### 1. The Ruling of the U.S. Court of International Trade

Although the *United States Shoe* ruling invalidated the HMT on cargo loadings for export, the Customs Service continued to collect the unloadings tax. On April 10, 2002, CF Industries filed this action in the CIT, seeking a ruling that the tax on cargo unloadings violates the Uniformity Clause, U.S. CONST. art. I, § 8, cl. 1, and the Port Preference Clause, U.S. CONST. art. I, § 9, cl. 6. Because there were no material facts in dispute, the parties filed cross-motions seeking legal rulings on the constitutional issues presented.[1]

In its motion for summary judgment, CF Industries focused on the HMT statute's "special rule for Alaska, Hawaii, and possessions" that exempts substantial "port use" (*i.e.*, unloadings of cargo) in Alaska and Hawaii from the

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[1] Jurisdiction in the CIT arose under 28 U.S.C. § 1581(i). *See Thomson Consumer Elecs., Inc. v. United States*, 247 F.3d 1210 (Fed. Cir. 2001).

tax, but does not exempt the same types of "port use" in any other coastal state. 26 U.S.C. § 4462(b). CF Industries explained that under this tax exemption, unloadings of cargo from intrastate shipments in Alaska and Hawaii are not taxed, even though unloadings from intrastate shipments in all of the other coastal states are taxed. *Id.* § 4462(b)(1)(D). Under this portion of the exemption, for example, shipments from Juneau unloaded in Anchorage are not taxed, whereas shipments from San Francisco unloaded in Los Angeles are taxed. CF Industries also focused on the fact that the HMT statute exempts unloadings in Alaska and Hawaii from the tax if the cargo is shipped from any of the other 48 states. *Id.* § 4462(b)(1)(A), (C). By contrast, a shipment from any of those same 48 states is taxed if unloading occurs in a coastal state other than Alaska or Hawaii. *See id.* § 4462(b). Under this portion of the exemption, shipments from San Francisco unloaded in Juneau are not taxed, whereas shipments from San Francisco unloaded in Seattle are taxed.

CF Industries argued that the tax exemption for Alaskan and Hawaiian ports violates the longstanding Uniformity Clause requirement that a tax must "apply, at the same rate, in all portions of the United States where the subject of the tax is found." *Ptasynski,* 462 U.S. at 84. CF Industries maintained that the HMT is unconstitutional, because the subject of the tax is cargo unloadings, and the tax is not assessed on certain unloadings in Alaska and Hawaii but is assessed on the same types of unloadings in the other coastal states.

CF Industries also argued that the exemption for Alaskan and Hawaiian ports violates the Port Preference Clause, by establishing an express preference for the ports of Alaska and Hawaii over the ports of the other coastal states.

The government opposed CF Industries' summary judgment motion and moved to dismiss, asserting that the HMT did not violate the Uniformity Clause or Port

Preference Clause. The CIT ruled for the government. The CIT explained its ruling in a three-page Memorandum Opinion that relied almost completely upon its earlier decision in *Thomson multimedia, Inc. v. United States*, 219 F. Supp. 2d 1322 (Ct. Int'l Trade 2002), which was incorporated by reference. (Pet. App. A21-23.)[2]

In *Thomson*, the CIT had held that a tax violates the Uniformity Clause "only where [the Court] finds that Congress' purpose was to promote regional favoritism or discrimination" (219 F. Supp. 2d at 1326) and also suggested that a tax does not violate the Uniformity Clause unless Congress has acted in "bad faith" (*id.* at 1328), rather than for a "benign" purpose (*id.* at 1329). The CIT therefore decided that as long as Congress has a proper reason for taxing one geographic region differently than another, the Uniformity Clause does not require the HMT to apply uniformly in all geographic areas where its subject is found. The CIT concluded that the HMT complies with the Uniformity Clause because Congress enacted the Alaska and Hawaii exemption for a proper purpose – to relieve tax burdens in the two states that are most dependent upon ocean transportation for domestic consumption – rather than for the improper purpose of promoting regional favoritism. *Id.* at 1327.

The CIT below also denied relief under the Port Preference Clause by relying on its ruling in *Thomson*. (Pet. App. A22.) In *Thomson*, the CIT conceded that "[b]y exempting Alaska and Hawaii domestic cargo, Congress arguably granted an express preference to those two states." *Thomson*, 219 F. Supp. 2d at 1331. However, the CIT also held that a statute that simply results in a preference does not

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[2] We are informed that Thomson will petition for a writ of certiorari on issues substantially related to the present case.

violate the Port Preference Clause, and that the statute must "explicitly discriminate against the ports of a particular state" to be unconstitutional. *Id.* at 1330. The court then elaborated upon what it meant by "explicit discrimination," holding that a statute only violates the Port Preference Clause if Congress had the improper purpose of "intend[ing] to channel commerce toward all of the ports of a favored state." *Id.* at 1331. The CIT held that the HMT was constitutional because the purpose of the Alaska and Hawaii exemption was to relieve an undue tax burden on those states rather than to channel commerce to them improperly as "favored" states. *Id.* at 1331-32.

### 2. The Ruling of the U.S. Court of Appeals for the Federal Circuit

CF Industries appealed to the U.S. Court of Appeals for the Federal Circuit, which affirmed the judgment of the CIT. The court of appeals first ruled that the Uniformity Clause does not apply to the HMT, on the ground that the HMT is a "user fee" and not a "tax." (Pet. App. A8-15.) Although this Court had held, in *United States Shoe*, that the HMT is a "tax" and not a "user fee," the court of appeals attempted to distinguish *United States Shoe* because it involved the Export Clause instead of the Uniformity Clause. The court of appeals concluded that the Export Clause imposes a narrower definition of a "tax" than other constitutional provisions do, so that the HMT is properly characterized as a "tax" (and not a "user fee") under the Export Clause and as a "user fee" (and not a "tax") under the Uniformity Clause. (*Id.*) Having ruled that the Uniformity Clause does not apply to the HMT, the court of appeals did not address the substantive scope of the Uniformity Clause.

The court of appeals then ruled that the HMT does not violate the Port Preference Clause. The court rejected CF Industries' argument that the special tax exemption for port use in Alaska and Hawaii meets the test for an

unconstitutional port preference. The court of appeals concluded that the exemption does not violate the Port Preference Clause, because the special exemption for Alaska and Hawaii does not involve "deliberate discrimination against the ports in one or more states and in favor of others." (*Id.* at A15.) The court of appeals acknowledged that no previous court had applied that test but found support for it in the original purpose of the Port Preference Clause, which the Founders intended to counteract regionalism. (*Id.* at A15-16.) In the court of appeals' view, the HMT statute was constitutional, because the exemption for Alaska and Hawaii was not intended to favor those states and was instead enacted for the proper purpose of alleviating the HMT's impact in those states, arising from their great dependency upon ocean-going cargo. (*See id.* at A19.)

This petition followed.

## REASONS FOR GRANTING THE PETITION

### I. THE COURT OF APPEALS' DECISION UNDER THE UNIFORMITY CLAUSE CONFLICTS WITH THE PREMISE OF THIS COURT'S DECISION IN *UNITED STATES SHOE*

The petition should be granted because the court of appeals' decision under the Uniformity Clause conflicts with the premise of this Court's decision in *United States Shoe*, 523 U.S. 360. In *United States Shoe*, the Court held that the HMT is a tax and not a user fee. *Id.* at 369. The court of appeals below reached the diametrically opposite conclusion, holding that the HMT is a user fee and not a tax. (Pet. App. A15.) The two rulings cannot be reconciled, as the court of appeals maintained, simply because *United States Shoe* addressed the Export Clause of Article I and this case addresses the Uniformity Clause of Article I. (*See id.* at A8-15.) This Court should grant the petition to resolve this conflict, which directly controls the entitlement to

approximately $1 billion in taxes assessed on cargo unloadings, as well as the disposition of more than 1,000 tax refund cases now pending in the CIT.

### A. The Court's Ruling in *United States Shoe* Controls This Case

This case is controlled by the Court's ruling, in *United States Shoe,* that the HMT is a tax and not a user fee. That ruling turned on the relationship between the monetary assessment, on the one hand, and the government services that the assessment would fund, on the other. The Court held that if the relationship was a close one, the assessment would properly be viewed as a fee for particular government services (*i.e.*, a user fee). On the other hand, the Court held that if the relationship was remote, the assessment would properly be viewed as a tax. The Court ruled that the HMT was a tax, because there was no direct correlation between the amount of tax a particular exporter paid and the harbor maintenance services the exporter received. *United States Shoe*, 523 U.S. at 369.

In *United States Shoe*, the Court explained that the HMT is an *ad valorem* tax (assessed as a fixed percentage of .125% of the value of the cargo loaded for export), and that cargo value "does not correlate reliably with the federal harbor services used or usable by the exporter." *Id.* That is because the extent and manner of port use depend, not upon cargo value, but upon "factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging." *Id.* The Court concluded that the HMT is a tax and not a user fee, because a user fee "must fairly match the exporters' use of port services and facilities." *Id.* at 370.

This ruling in *United States Shoe* controls this case, because both cases have an identical relationship between the monetary assessment and the government services provided. The HMT statute imposed exactly the same

assessment – a fixed percentage of .125% of cargo value – in this case as in *United States Shoe*, because the statute uses the same tax rate regardless of whether a cargo loading or unloading is involved. 26 U.S.C. § 4461(b). In addition, the government services at issue – harbor maintenance services – are the same in *United States Shoe* and in the present case. The only differences between the cases concern the times that the assessment occurred and the times that harbor maintenance services were provided. In *United States Shoe*, liability for the tax attached at the time cargo was loaded for export, whereas in the present case, liability for the tax attached at the time cargo was unloaded following a domestic shipment. *Id.* § 4461(c)(2). In addition, in *United States Shoe*, the harbor services were utilized before cargo was exported, whereas in the present case, the harbor services were utilized before and after domestic shipments were made. These trivial differences between this case and *United States Shoe* have absolutely no bearing on the question whether the HMT is a tax, which turns purely on the relationship between the assessment and the government service provided.

Because the assessment, the government service, and the relation between the two are the same in this case as in *United States Shoe*, this case is controlled by the Court's ruling that the HMT is a tax and not a user fee. The central question in this case, as in *United States Shoe*, is whether an *ad valorem* method of calculation has any correlation to port use, which is the subject of the tax. The answer to that question derives from the nature of the charge and the characteristics of port use, and is unrelated to the particular constitutional provision under challenge.

## B. *United States Shoe* is Not Distinguishable From This Case

### 1. The Court of Appeals' Effort to Distinguish *United States Shoe* Does Not Withstand Scrutiny

The Court's ruling, in *United States Shoe*, that the HMT is a tax is not limited to the Export Clause context as the court of appeals held. (*See* Pet. App. A9-10.) This Court gave no indication that its *United States Shoe* ruling was so limited, and its reasoning easily extends to the Uniformity Clause, which addresses the federal taxing power in the same terminology as the Export Clause.

*First*, this Court did not, as the court of appeals suggested, rely upon a "stringent standard specific to the Export Clause" in determining whether the HMT is a tax. (*See id.*) While this Court emphasized that the Constitution places stricter *limitations* on export taxes than on other taxes, it did not hold that the *definition* of what *constitutes* a tax is somehow different under the Export Clause than under other constitutional provisions that use the same or similar language. Indeed, as explained *infra* in Section B.2, this Court's other decisions call for a consistent definition of "tax" in the various Article I provisions governing the taxing power.

*Second*, this Court did not limit its ruling to the Export Clause context, as the court of appeals held, simply because *United States Shoe* relied upon an Export Clause precedent (*Pace v. Burgess*, 92 U.S. 372 (1875)) and distinguished three precedents under other constitutional provisions, holding that they "[did] not govern" the case. *United States Shoe*, 523 U.S. at 368. (*See* Pet. App. A9-10.) This Court suggested that these other three precedents did not apply because they shed no light on the specific *textual* question before the Court – whether the HMT fit within the language of the Export Clause, as a prohibited "tax or duty" laid on

exports. U.S. CONST. art. I, § 9, cl. 5.

None of the three precedents that the Court distinguished analyzed the difference between user fees, on the one hand, and exactions that meet the constitutional terms "tax" or "duty," on the other. For example, one precedent addressed the difference between a prohibited state restriction on interstate commerce and a user fee (rather than the difference between an Article I "tax" or "duty" and a user fee). *See United States Shoe*, 523 U.S. at 367-68 (citing *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 717-21 (1972)). In distinguishing this precedent, the Court raised the difference between interpreting express and implied constitutional requirements, noting the stark contrast between the fluid "'nontextual negative command'" of the Commerce Clause and the more restrictive "'textual command'" of the Export Clause at issue in *United States Shoe*. *United States Shoe*, 523 U.S. at 368 (quoting *United States v. IBM Corp.*, 517 U.S. 843, 851 (1996)).

Another precedent distinguished in *United States Shoe* addressed the difference between a prohibited violation of state sovereign immunity and a user fee (rather than the difference between an Article I "tax" or "duty" and a user fee). *See United States Shoe*, 523 U.S. at 367-68 (citing *Massachusetts v. United States*, 435 U.S. 444, 463-67 (1978)). Although this case involved the states' immunity from federal taxation, no construction of the terms "tax" and "duty" was involved, because that immunity has no express textual basis and was "judicially implied from the States' role in the constitutional scheme." *Massachusetts*, 435 U.S. at 455.

The third precedent distinguished in *United States Shoe* addressed the difference between a Fifth Amendment Taking and a user fee, which also obviously did not raise the textual question before the Court. *United States Shoe*, 523 U.S. at 367-68 (citing *United States v. Sperry Corp.*, 493 U.S. 52, 62

(1989)).

The court of appeals' analysis does not undermine the conclusion that *United States Shoe* controls this case. As explained below, the Uniformity Clause at issue here utilizes the same terminology as the Export Clause at issue in *United States Shoe*, unlike the constitutional provisions addressed in the three precedents that *United States Shoe* distinguished.

### 2. The Terms "Tax" and "Duty" Have the Same Meaning in Different Provisions of Article I

The ruling in *United States Shoe* applies to this case, because the terms "tax and "duty" (which the Court interpreted in *United States Shoe*) have the same meaning in the Export Clause as in the Uniformity Clause and related provisions of Article I.

Article I provides that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises." U.S. CONST. art. I, § 8, cl. 1. Under this provision, the Court has held that there are only two categories of assessments embraced by the term "tax": direct taxes and indirect taxes. *See, e.g., Steward Mach. Co. v. Davis*, 301 U.S. 548, 581-82 (1937). Direct taxes – which are those "taxes" that are not "duties, imposts and excises" – are assessed directly upon people (*i.e.*, capitation taxes) or upon property ownership without regard to its use or disposition. *See* U.S. CONST. art. I, § 9, cl. 4; *Fernandez v. Weiner,* 326 U.S. 340, 361-62 (1945). By contrast, indirect taxes are "duties, imposts and excises," all of which are assessments imposed on the use or disposition of property. *Steward Mach. Co.*, 301 U.S. at 581-82; *Fernandez,* 326 U.S. at 361-62. Relying on historical evidence from 1787, when Article I was drafted, the Court has indicated that the term "duty" is the broadest of the three terms, encompassing both "impost" (which equates to modern day customs duties) and "excise." *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 290-91 (1976). Taken

together, the terms "duty," "impost" and "excise" cover every type of indirect tax. *Steward Mach. Co.*, 301 U.S. at 581-82; *see also Ptasynski*, 462 U.S. at 80.

This Court's decision in *United States Shoe* indicates that the HMT on exports was a "duty" or other indirect "tax" within the meaning of Article I. The Court held that the HMT was a "tax" or "duty" within the meaning of Article I's Export Clause. *United States Shoe*, 523 U.S. at 362, 370. The Court's analysis indicates that the particular species of "tax" at issue was an indirect tax, incurred because of the use or disposition of property. That is because the HMT was assessed on the loading of cargo for export transit. *See id.* at 364 & n.1.[3]

By contrast, the court of appeals' ruling necessarily rests on the premise that the HMT is neither a "duty" nor any other indirect "tax." Under the court of appeals' ruling, the HMT could not have been a "duty," because the Uniformity Clause applies to "*all* duties, imposts and excises." U.S. CONST. art. I, § 8, cl. 1 (emphasis added). The HMT also could not have been an indirect "tax" under the court of appeals' ruling, because this Court has interpreted the Uniformity Clause to apply to all indirect "taxes" that Article I grants Congress the power to enact. *Ptasynski*, 462 U.S. at 80-81 & n.9; *Steward Mach. Co.*, 301 U.S. at 581-82. The term "tax" does not appear in the Uniformity Clause. However, in Article I, the Uniformity Clause immediately

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[3] The HMT also bore no *indicia* of a direct tax, because it was not a capitation tax or a tax assessed purely as a result of property ownership. In addition, if the HMT had been a direct tax, it would have been subject to the provision of Article I requiring direct taxes to be laid "in Proportion to the Census or Enumeration herein before directed to be taken." U.S. CONST. art. I, § 9, cl. 4; *see also Ptasynski*, 462 U.S. at 80 n.9. The HMT obviously did not satisfy this requirement, and the Court did not suggest that it should.

follows, and qualifies, the "Power To lay and collect Taxes, Duties, Imposts and Excises," providing that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1. The Court has long held that the "duties, imposts and excises" governed by the Uniformity Clause are a subset of the "taxes" that Congress has the power to enact under Article I. *See, e.g.*, *Ptasynski*, 462 U.S. at 80 ("The Uniformity Clause conditions Congress' power to impose indirect taxes."); *Fairbank v. United States*, 181 U.S. 283, 296 (1901).

1. The only way to distinguish *United States Shoe* from the present case, as the court of appeals attempted to do, is to conclude that the terms "duty" and indirect "tax" have different meanings under the Export Clause than under the Uniformity Clause and related provisions of Article I. Such a conclusion does not square with this Court's precedents. The Court has often ruled that a term that appears more than once in the Constitution's text has the same meaning each time it appears, particularly where, as here, the different provisions containing the term were ratified contemporaneously. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) ("the people" has the same meaning in the Fourth Amendment as in the First, Second, Ninth and Tenth Amendments); *cf. Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) ("When two parts of a provision (the Eighth Amendment) use different language to address the same or similar subject matter, a difference in meaning is assumed.") (Scalia, J., concurring). The Court has consistently applied that interpretive principle when construing the terms "tax," "duty," "impost," and "excise" under Article I.

For example, the Court has held that the "duties, imposts and excises" that Congress has the power to "lay and collect" under Article I, section 8 are the same "duties, imposts and excises" referred to in the Uniformity Clause. *Steward*

*Mach. Co.*, 301 U.S. at 581-82; *Knowlton v. Moore,* 178 U.S. 41, 87-88 (1900). The Court also has concluded that the Export Clause limits the same "taxes" and "duties" that Congress has the Article I power to "lay and collect," by providing that a "tax" or "duty" cannot be "laid" on exported articles. *Fairbank,* 181 U.S. at 289-90, 295-96. The Court similarly has interpreted the term "duty" consistently under the Export Clause and the Import-Export Clause of Article I (*United States v. IBM Corp.* 517 U.S. 843, 857 (1996)) and has construed "imposts" and "duties" the same way under the Import-Export Clause and Article I, section 8, which grants Congress the power to assess "imposts" and "duties." *Michelin Tire Corp.*, 423 U.S. at 290-93.

As interpreted by this Court, therefore, the provisions of Article I governing taxation are well integrated with one another, establishing a coherent regime in which the same terms share a common meaning. These precedents demonstrate that *United States Shoe* is not distinguishable from this case, because an indirect "tax" or "duty" means the same thing under the Export Clause as under the Uniformity Clause.

2. The conclusion that the Export Clause and Uniformity Clause must be interpreted consistently draws additional support from their common function and history. Both clauses impose express limitations on the power to "lay and collect" taxes conferred by section 8 of Article I. *United States Shoe,* 523 U.S. at 368 (Export Clause limits the taxing power); *Ptasynski,* 462 U.S. at 80 (Uniformity Clause limits the taxing power); *Fairbank*, 181 U.S. at 295-96 (Export Clause and Uniformity Clause are two of the three express limitations on the taxing power). Because both clauses limit the power to tax, both were proposed, during the Constitutional Convention, as measures that would immediately follow the delineation of that power in the text of Article I; the Uniformity Clause ultimately retained that

position in the final version of the Constitution, whereas the Export Clause was placed in a different section of Article I, even though it remains a restriction on the taxing power. *See* U.S. CONST. art. I, § 8, cl. 1; James Madison Notes (Aug. 16, 1787) *in* 3 *THE FOUNDERS' CONSTITUTION* 366-67 (Philip B. Kurland & Ralph Lerner eds., 1987).

In addition, the Founders adopted both clauses to serve the same general purpose: preventing some states from imposing unfair exactions on other states. The Export Clause was proposed by Southern delegates to the Federal Convention, who "feared that the Northern States would control Congress and would use taxes and duties on exports to raise a disproportionate share of federal revenues from the South." *IBM Corp.*, 517 U.S. at 859 (citing 2 M. Farrand, *The Records of the Federal Convention of 1787* (rev. ed. 1966)). The Uniformity Clause also was adopted to prohibit the national government from imposing taxes that favored some states and disadvantaged others, which could create "'the grossest and most oppressive inequalities'" and permit the "'agriculture, commerce, or manufactures of one State [to] be built up on the ruins of those of another.'" *Ptasynski*, 462 U.S. at 81 (quoting 1 J. Story, *Commentaries on the Constitution of the United States* § 957 (T. Cooley ed. 1873)). The common function and history of the Uniformity Clause and the Export Clause further underscore that the court of appeals' decision that the HMT is a user fee and not a tax conflicts with this Court's decision, in *United States Shoe,* that the HMT is a tax and not a user fee.

If applied in other cases, the premise underlying the court of appeals' ruling – that the same terms have different meanings in different provisions of Article I – would undermine the coherent and integrated taxation regime that the Founders designed. The possibility arises, for example, that under Article I section 8, the Congress would have the power to enact some "duties, imposts and excises" that are

subject to the Uniformity Clause and others that are not. The Congress also might have the power to imposes "taxes" or "duties" that are not subject to the Export Clause at all, or "duties" that are governed by the Export Clause but not by the Uniformity Clause. The Court should review this case to address these far-reaching consequences for the integrity of the constitutional scheme.

### C. The Court Should Grant Review to Prevent the Court of Appeals' Decision From Creating a Broad and Disruptive Impact on Federal Taxation

The court of appeals' conclusion that the same assessment can be simultaneously both a "tax" and a "user fee" has enormously broad and negative practical implications for the taxation regime established under Article I. This Court should grant review to prevent the court of appeals' flawed conclusion from standing as the law of the land for the customs taxes subject to the Federal Circuit's exclusive nationwide jurisdiction.

#### 1. The Federal Budget Process Would Be Substantially Disrupted if Taxes Could be Characterized as User Fees

The federal budget process would be substantially disrupted if taxes could be characterized legitimately as user fees. The question whether an assessment is a tax or a user fee fundamentally affects the significant and politically charged questions whether Congress has raised taxes, and whether the federal budget is in balance, in deficit, or in surplus. The Congress has excluded user fees from the budget deficit calculus. *See* Congressional Budget Office, Congress of the United States, *The Growth of Federal User Charges* 19, 31-32 (1993). If taxes could be characterized freely as user fees, there would be an obvious tendency for budget deficit accounting to be skewed, as the Congress increasingly raised money through assessments called "user

fees" instead of "tax increases."

The legislative history of the HMT illustrates the congressional practice of omitting user fees from the deficit calculus. When various proposals for the HMT were under consideration in 1985, the Chairman of the House Budget Committee indicated that the HMT would not affect the budget deficit if structured so that there was a direct relationship between the exaction and the government services provided (*i.e.*, as a user fee). In particular, the Chairman indicated that there would be no budget deficit effect if the HMT were assessed based upon the volume or weight of cargo (rather than its value), because there would be a direct relationship between higher assessments imposed on shipments of large and bulky cargos and the greater harbor services that shipment of such cargos required. 131 Cong. Rec. H9737 (daily ed. Nov. 6, 1985) (letter from Hon. William H. Gray III, Chairman, House Budget Comm. to Hon. Walter B. Jones, Chairman, Comm. on Merchant Marine & Fisheries).

By contrast, the Budget Committee Chairman stated that there would be an effect on the budget deficit if the HMT were structured so that there was no direct connection between the charge and the harbor services provided (*i.e.*, as a tax). In particular, the Chairman indicated that an assessment based upon the value of cargo would so affect the deficit. The premise of the Chairman's analysis (wholly consistent with this Court's later analysis in *United States Shoe*) was that there would be "little relationship" between an *ad valorem* assessment and the harbor maintenance services it funded:

> A very valuable cargo, diamonds for example, would be taxed at a higher rate than a less valuable cargo which might weigh substantially more. This would be the result even though the less valuable cargo may require larger port facilities, deeper harbors, etc.

*Id.* As a result, the *ad valorem* assessment would be "more like a tax imposed by the United States pursuant to its revenue raising power." *Id.*

The Congress ultimately enacted the *ad valorem* version of the HMT, of course, and therefore included the HMT in the deficit calculus. *See The Growth of Federal User Charges* 22, 31-32 (HMT is a benefit-based tax, which is "revenue" for budget purposes). However, the court of appeals' analysis obviously would have provided the Congress with a strong rationale for converting the HMT from a "tax" to a "user fee." If Congress had done so, the effect of the HMT on the budget deficit would have been obscured from public view, and the deficit accounting would have been materially affected; currently the HMT accounts for approximately $500 million each year in taxes. *See, e.g.,* U.S. Army Corps of Engineers, IWR-Report 00-R07, *Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1999* 13 (2001).

Furthermore, the potential effect of the court of appeals' analysis extends well beyond the specific budgetary impact of the HMT. There already is a well-developed trend for Congress to structure charges as user fees instead of taxes. The Congressional Budget Office has indicated that deficit reduction legislation in the 1980's and 1990's encouraged the Congress and federal agencies to add user fees "both to reduce recorded agency expenditures and to make it possible for programs to expand without increasing net outlays or raising taxes." *The Growth of Federal User Charges* 19. Indeed, in 2000, the Office of Management and Budget acknowledged an Administration policy "to shift to user fee funding wherever appropriate." Office of Management & Budget, The Executive Office of the President, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2001* 94 (2000). The result of these dynamics has been a great proliferation of user fees in recent years.

*See The Growth of Federal User Charges* 19; United States General Accounting Office, Federal User Fees: Budgetary Treatment, Status, and Emerging Management Issues 1, 7-9 (1997). The Office of Management and Budget recently reported that user fees will contribute more than $173 billion to federal government programs in fiscal year 2004. Office of Management & Budget, The Executive Office of the President, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2004* 89 (2003).

If the Congress and the Executive Branch could freely characterize taxes as user fees, as the court of appeals did, they would have every reason to do so, and the pernicious effect on the accounting for the federal budget deficit would be enormous. This Court should grant this petition to review the significant question whether the same assessment may be both a tax and a user fee.

**2. The Legislative Process Would be Disrupted if the Same Assessment Could be Characterized Both as a Tax and a User Fee**

The legislative process governing taxation also would be substantially affected if the same assessment could be characterized both as a tax and a user fee. That process depends fundamentally upon determinations that particular assessments are *either* taxes *or* user fees. If the court of appeals were correct, and the same measure could be both a tax and a user fee at the same time, the legislative process would be disrupted. The Court should grant review because of this important collateral implication of the court of appeals' decision.

The question whether an assessment is a tax or a user fee fundamentally affects whether Congress may delegate, to an administrative agency, the power to impose the assessment. While Congress has the power to impose both taxes and user

fees, it may not constitutionally delegate its power to tax but may permit the agencies to impose user fees under statutory authorization. *See Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974). Therefore the characterization of an assessment as either a tax or a user fee is vitally important to determine whether delegation is permissible. If the same assessment could be both a tax and a user fee, as the court of appeals held, this critical determination would be fraught with difficulty, undermining the Congress's ability to evaluate its own constitutional limits. This Court accordingly should review the court of appeals' ruling that an assessment can be both a tax and a user fee at the same time.

The question whether an assessment is a tax or a user fee also could affect which house of Congress may originate the measure. The Origination Clause of Article I requires that "All Bills for raising Revenue shall originate in the House of Representatives." U.S. CONST. art. I, § 7, cl. 1. The Origination Clause only governs bills that "levy taxes, in the strict sense of the word," and "bills for other purposes which may incidentally create revenue" need not originate in the House. *Twin City Nat'l Bank of New Brighton v. Nebecker*, 167 U.S. 196, 202 (1897) (citing 1 J. Story, *Commentaries on the Constitution* § 880, p. 610-611 (3d ed. 1858)); *see also United States v. Munoz-Flores*, 495 U.S. 385, 397 (1990). The characterization of an assessment as a tax or user fee is integrally related to whether it is imposed by a "statute that raises revenue to support the Government generally," which must originate in the House. *Munoz-Flores*, 495 U.S. at 397-98. Because a particular revenue measure either is, or is not, required to originate within the House, this Court should review the court of appeals' ruling that an assessment can be both a tax and a user fee at the same time.

Finally, the question whether an assessment is a tax or a

user fee fundamentally affects which Committee of the House of Representatives has jurisdiction to consider it, because the Ways and Means Committee has exclusive jurisdiction over taxes, whereas other standing Committees (as well as Ways and Means) may report out measures raising user fees. *See The Growth of Federal User Charges* 23. The legislative history of the HMT reflects this jurisdictional issue within the House. The House Budget Committee Chairman indicated that the HMT would be outside the jurisdiction of the House Merchant Marine and Fisheries Committee if it were assessed on an *ad valorem* basis (because it would be a tax) but within the jurisdiction of that Committee if it were assessed on the weight or volume of cargo (because it would be a user fee). 131 Cong. Rec. H9737 (daily ed. Nov. 6, 1985). Because the House Ways and Means Committee either does, or does not, have exclusive jurisdiction over a particular revenue measure, this Court should review the court of appeals' ruling that an assessment can be both a tax and a user fee at the same time.

### D. The Court's Review Should Address the Substantive Scope of the Uniformity Clause

If the Court grants the petition to resolve the conflict with *United States Shoe* on the tax/user fee question, the Court's review also should address the substantive scope of the Uniformity Clause. The court of appeals did not delineate the substantive scope of the Uniformity Clause, because it held that the Clause did not govern the HMT. However, the CIT did address the issue, proffering an interpretation of the Uniformity Clause that does not square with this Court's precedents. Although this Court does not typically review an issue decided by the trial court but not by the court of appeals, it should do so here, because the CIT's Uniformity Clause decision has a binding effect nationwide; that broad effect stems from the CIT's unique role in the federal

judiciary, as the trial court with exclusive jurisdiction over cases involving customs duties. *See* 28 U.S.C. § 1581. Because of that exclusive jurisdiction, Congress has established the CIT nationally as the frontline judicial guardian of the Uniformity Clause as it applies to customs duties. The Chief Judge of the CIT explained this significant responsibility when that court was created in 1980:

> These additions to the court's jurisdiction, particularly, 28 U.S.C. § 1581(i), the residual jurisdiction provision, were designed to implement the constitutional mandate that 'all Duties, Imposts and Excises shall be uniform throughout the United States.'

19 U.S.C.A. §§ 1-1550, at xxx (West 1999).

In this case, review of the CIT's nationally binding ruling is warranted, because that court materially altered the scope of the Uniformity Clause as construed in this Court's precedents. This Court has long held that the Uniformity Clause requires taxes to be "geographically" uniform. *See, e.g., Knowlton v. Moore,* 178 U.S. 41, 106 (1900). Geographic uniformity means that a tax "operates with the same force and effect in every place where the subject of it is found." *Edye v. Robertson*, 112 U.S. 580, 594 (1884); *see also Knowlton,* 178 U.S. at 106. Thus, if "a subject is taxed anywhere, the same [subject] must be taxed everywhere throughout the United States, and at the same rate." *Knowlton*, 178 U.S. at 84. The Court's most recent examination of the Uniformity Clause reaffirms that once Congress has defined the class to be taxed, the tax must "apply wherever the classification is found." *Ptasynski*, 462 U.S. at 82.

Notwithstanding these precedents, the CIT held that Congress *does* have the power to tax the same subject differently in different geographic areas, as long as it has a good reason for doing so. The CIT incorporated by reference its decision in *Thomson*, in which it held that a tax

violates the Uniformity Clause "only where [the Court] finds that Congress' purpose was to promote regional favoritism or discrimination" (219 F. Supp. 2d at 1326) and also indicated that a tax does not violate the Uniformity Clause unless Congress has acted in "bad faith" (*id.* at 1328), rather than for a "benign" purpose (*id.* at 1329).

In the present case, the CIT concluded that the HMT's benign purpose rendered it constitutional, regardless of whether the same subject was taxed the same way in all geographic areas where it exists. In particular, the CIT ruled that the Uniformity Clause did not prohibit the tax exemption for Alaskan and Hawaiian ports, even though the subject of the tax – "port use" defined as cargo unloadings – was taxed differently in Alaska and Hawaii than in the other coastal states. The CIT concluded that the HMT was constitutional, because Congress enacted the exemption for the purpose of alleviating the disproportionate impact of the tax in the two states most dependent upon ocean shipping. (Pet. App. A21-23.)

If the CIT were correct, Congress could freely tax the same subject differently in different regions of the country as long as it had a good reason for doing so, and the Uniformity Clause would be rendered a nullity. Under the CIT's decision, the Congress could, for example, impose different customs duty rates in different ports for the same merchandise, as long as the congressional purpose was to address local economic conditions. Because of the CIT's exclusive jurisdiction, its decision now states the governing constitutional standard for customs duties throughout the nation. If the Court grants review of the Uniformity Clause issues in this case, that review should extend to the substantive scope of the Uniformity Clause, so that this Court may directly address the CIT's contention that Congress may enact a tax that treats the same subject differently in different geographic areas.

## II. THE COURT SHOULD GRANT THE PETITION TO ADDRESS THE QUESTION WHETHER THE PORT PREFERENCE CLAUSE REMAINS A MEANINGFUL LIMIT ON CONGRESSIONAL POWER

The Court also should grant the petition to address the significant question whether the Port Preference Clause retains continuing vitality as a meaningful limit on congressional power. The court of appeals announced a new test under the Clause that would eviscerate its protections, consistent with the government's view that the Port Preference Clause is "essentially a dead letter." (Pet. App. A38.) The Court should review this case to clarify the requirements of the Port Preference clause.

The Port Preference Clause provides that "[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U.S. CONST. art. I, § 9, cl. 6. This Court has identified two tests for an unconstitutional port preference. *First*, the preference must be a "direct" preference expressly conferred by the statute at issue; the Clause does not prohibit mere "incidental advantages" to ports stemming from facially neutral statutes. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 435 (1855); *Armour Packing Co. v. United States*, 209 U.S. 56, 80 (1908); *see also Ala. Great S. Ry. Co. v. United States*, 340 U.S. 216, 229 (1951) (Port Preference Clause not violated because "whatever preference there is to New Orleans is the result of geography and not of any action of the [Interstate Commerce] Commission"). *Second*, to violate the Port Preference Clause, a preference must be drawn along state lines. "[W]hat is forbidden is, not discrimination between individual ports within the same or different States, but discrimination *between* States. . . ." *Wheeling*, 59 U.S. at 435 (emphasis added); *La. Pub. Serv. Comm'n v. Tex. & New Orleans R.R.*, 284 U.S. 125, 131 (1931).

However, under the court of appeals' analysis, the exemption for Alaska and Hawaii was constitutional, even though it met the two tests previously established by this Court. The HMT statute does contain an express tax exemption for the ports of Alaska and Hawaii, and the statute treats all of the ports of Alaska and Hawaii more favorably than all of the ports of the other coastal states. The court of appeals reached its decision by adding a newly minted third test for an unconstitutional port preference: it must involve "deliberate discrimination against the ports in one or more states and in favor of others." (Pet. App. A15.)

In one sense, of course, "deliberate discrimination" occurs every time Congress makes an express distinction in a statute, for purposes no one could doubt are proper. *Cf. Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (state statute may "discriminate" against interstate commerce even if the statute "serves a legitimate local purpose"). But what the court of appeals meant by "deliberate discrimination" carries a more sinister connotation. The court of appeals concluded that to be unconstitutional, a port preference must derive from favoritism for one state over another, intended to channel commerce to certain states simply because they are more favored than others. (Pet. App. A19.) In the court of appeals' view, the HMT statute did not meet this test, because the exemption for Alaska and Hawaii was not intended to "favor" those states and was instead enacted for the purpose of alleviating the HMT's disproportionate impact in those states, arising from their high dependency upon ocean-going cargo. (*See id.*)

The effect of this third test was to gut the protections of the Port Preference Clause. It would be rare indeed for Congress to leave evidence that it distinguished between states for the nefarious purpose of "favoring" some states at the expense of others. The government admitted as much in the CIT, when if proffered the third test to the court in the

related *Thomson* case:

> THE COURT: Well, how is Congress going to show intentional discrimination, other than saying, We favor Hawaii and Alaska?
>
> [GOVERNMENT COUNSEL]: Well, that's exactly the point, Your Honor. That's why this clause has never been used to strike down a – a statute or a regulation. *It's essentially a dead letter.*

(Pet. App. A38 (emphasis added).)

This Court should grant the petition to delineate the scope of the protections provided by the Port Preference Clause. If left unreviewed, the court of appeals' decision would have a long and lasting impact on the revenue laws affecting the nation's ports. The Federal Circuit has exclusive jurisdiction at the court of appeals level to review such laws, and therefore Supreme Court review is the only mechanism for alleviating the impact of the constitutional ruling here presented. *See* 28 U.S.C. § 1295(a)(5) (granting Federal Circuit exclusive jurisdiction to review CIT decisions); *id.* § 1581 (granting CIT exclusive jurisdiction to review customs revenue laws). This Court has previously granted certiorari because it was the only avenue for relief on significant issues within the Federal Circuit's exclusive jurisdiction. And the Court should do so here. The court of appeals acknowledged that it found no precedent in this Court's decisions (or in the decisions of any other court) for its new third test under the Port Preference Clause. (Pet. App. 16-17.) This Court should exercise its discretion to make its views known on such a significant question, which controls whether a provision of the Constitution does, or does not, impose meaningful restrictions on congressional power.

Furthermore, the Court should grant the petition because of the broad impact it would have on the many thousands of

shippers who pay the HMT. Although the court of appeals concluded that the purpose behind the Alaska and Hawaii exemption was legitimate, the exemption's effect is extraordinarily unfair to shippers such as CF Industries. For example, under the portion of the exemption applicable to shipments from the "lower 48" states, shippers such as CF Industries (which unloads cargo in Louisiana that was shipped from Florida) pay the tax, whereas shippers that unload identical cargo in Alaska or Hawaii that also was shipped from the "lower 48" pay no tax. 26 U.S.C. §§ 4462(b)(1)(A), (C). Accordingly, CF Industries paid more than $50,000 in HMT last year, based on unloadings of fertilizer valued at $46 million, while others who ship fertilizer of exactly the same value pay nothing when they unload in Alaska and Hawaii.[4] The Court should review the court of appeals' decision to provide a remedy for this manifestly unequal treatment.

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[4] In the year 2000 alone, no HMT was required on approximately 33,000 tons of nitrogen and phosphate fertilizer shipped from the mainland and unloaded in Hawaii. *See Worldwide NPK Capacity Listing by Plant*, FERTILIZER SITUATION REP. (Int'l Fertilizer Dev. Ctr., Muscle Shoals, Ala.), Aug. 2000; D.L. Terry & Bill J. Kirby, *Commercial Fertilizers 2001* (Ass'n of Am. Plant Food Control Officials, Inc., Lexington, Ky. & Fertilizer Institute, Washington D.C), June 2002; *Piers U.S. Import Information*, J. COM. (Port Imp. Exp. Reporting Serv., Newark, NJ), Oct. 2002.

## CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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December 15, 2003

United States Court of Appeals for the Federal Circuit

03-1044

THOMSON MULTIMEDIA INC.

(now known as Thomson Inc.),

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

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03-1137

CF INDUSTRIES, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

## Judgment

*ON APPEAL from the* United States Court of International Trade

*In CASE NO(S).* 95-03-00277 & 02-00281

*This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:*

AFFIRMED.

***ENTERED BY ORDER OF THE COURT***

/s/

*Jan Horbaly, Clerk*

DATED AUG 1 8 2003

ISSUED AS A MANDATE: October 9, 2003

**United States Court of Appeals for the Federal Circuit**

03-1044

THOMSON MULTIMEDIA INC. (now known as Thomson Inc.),

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

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03-1137

CF INDUSTRIES, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

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DECIDED: August 18, 2003

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Before NEWMAN, MICHEL, and RADER, Circuit Judges.
MICHEL, Circuit Judge.

Plaintiff-appellant Thomson Multimedia Inc. ("Thomson") appeals from the United States Court of International Trade's grant of summary judgment in favor of the United States. Thomson Multimedia Inc. v. United States, 219 F. Supp. 2d 1322 (Ct. Int'l Trade 2002). The court granted summary judgment because it held that the Harbor Maintenance Tax ("HMT"), 26 U.S.C. §§ 4461-4462 (2000), as applied to imports, was constitutional in light of

both the Uniformity, Art. I, § 8, cl. 1, and Port Preference, Art. I, § 9, cl. 8, Clauses of the U.S. Constitution. Plaintiff-appellant CF Industries, Inc. ("CF Industries") appeals from a separate grant of summary judgment in favor of the United States by the Court of International Trade. The trial court granted summary judgment in that case because, based upon its interpretation of the Uniformity and Port Preference Clauses in Thomson, the HMT as applied to domestic unloadings was also constitutional. Given their interdependency, we address these two, separate appeals in a single decision. Because we hold that the HMT as applied to imports and domestic unloadings is a user fee rather than a tax and because we hold that the various exemptions in the HMT do not violate the Port Preference Clause of the Constitution, we affirm the Court of International Trade's decisions in both cases.

## BACKGROUND

The HMT was enacted as part of the Water Resources Development Act of 1986 ("WRDA"), Pub. L. 99-662, 100 Stat. 4082. Congress intended the HMT to help finance the general maintenance and improvement of ports in the United States. S. Rep. No. 99-126, at 9-10 (1985), reprinted in 1986 U.S.C.C.A.N. 6639, 6640-47. The HMT imposes an ad valorem charge of 0.125 percent of the value of the commercial cargo involved in "any port use." 26 U.S.C. § 4461(b). The statute defines the term "port" as "any channel or harbor (or component thereof) in the United States, which ... (i) is not an inland waterway, and (ii) is open to public navigation." Id. § 4462(a)(2)(A); see also id. § 4462(a)(2)(B)-(C). The statute defines "port use" as, in the case of imports and domestic shipments, "the unloading of commercial cargo from, a commercial vessel at a port." Id. § 4462(a)(1)(B); see also id. § 4461(c)(2). The statute sorts commercial cargo into three categories: (1) "cargo entering the United States" (i.e., imports); (2) "cargo to be exported

from the United States" (i.e., exports); and (3) "any other case" (i.e., domestic cargo). Id. § 4461(c)(1). A separate statute establishes the Harbor Maintenance Trust Fund ("HMT Fund") for revenue raised by the HMT to be expended on the operation and maintenance of channels and harbors. Id. § 9505.

Importantly for these appeals, the HMT contains several implicit and explicit exemptions. First, the statute effectively exempts "inland waterway[s]" from HMT liability by excluding them from the statute's definition of "port." 26 U.S.C. § 4462(a)(2)(A)(ii). Second, the statute effectively exempts from the HMT part of the Columbia River by including channels of that river "only up to the downstream side of Bonneville lock and dam." Id. § 4462(a)(2)(C). Third, the statute explicitly exempts from the HMT domestic cargo (excluding crude oil) either unloaded in Hawaii, Alaska, or U.S. possessions or unloaded in the continental United States and shipped from Alaska, Hawaii, or a U.S. possession. Id. § 4462(b).

In the trial court, the two plaintiff-appellants challenged the HMT as applied to domestic unloadings and imports. Thomson is an importer of consumer electronic products and pays over $1 million per year in HMTs. Thomson argued the HMT is unconstitutional because: (1) the unconstitutional export provision[1] is not severable from the rest of the statute; (2) it violates the Uniformity Clause of the Constitution because it causes a geographical bias by exempting Alaska and Hawaii, a 47.5 mile segment of the Columbia. River, and inland waterways; and (3) it violates the Port Preference Clause of the Constitution by exempting

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[1] In United States v. United States Shoe Corp., 523 U.S. 360, 370 (1998), the Supreme Court held that the HMT as applied to exports was unconstitutional because it violated the Export Clause of the Constitution, Art. I, § 9, cl. 5.

Alaska and Hawaii, a 47.5 mile segment of the Columbia River, and inland waterways.

CF Industries is a domestic shipper of phosphate fertilizer that paid a total of $323,416 in HMTs from December 1999 to June 2002. CF Industries argues only that the HMT as applied to domestic unloadings violates both the Uniformity and Port Preference Clauses of the Constitution because it exempts domestic unloadings of cargo in Alaska and Hawaii.

The Court of International Trade dealt with these issues in its Thomson opinion granting summary judgment in favor of the government. 219 F. Supp. 2d. at 1322-32. First, it held that the import clause was severable from the HMT on exports "because the Federal Circuit has 'specifically held that the unconstitutional export provision in the HMT is severable from the remainder of the statute.'" Id. at 1324 (quoting Amoco Oil Co. v. United States, 234 F.3d 1374, 1377 (Fed. Cir. 2000)); see also Princess Cruises, Inc. v. United States, 201 F.3d 1352, 1358 (Fed. Cir. 2000); Carnival Cruise Lines, Inc. v. United States, 200 F.3d 1361 (Fed. Cir. 2000). Second, the trial court held the HMT as applied to imports was a "tax" rather than a "user fee" based upon its decision in United States Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995) (holding the HMT as applied to exports was a tax because it did not satisfy the second and third prongs of the three-prong test established in Massachusetts v. United States, 435 U.S. 444 (1978)). Third, the trial court interpreted both the Uniformity and Port Preference Clauses of the Constitution as prohibiting only geographic (or port) distinctions effectively designed to promote state versus state or region versus region favoritism or discrimination. Thomson, 219 F. Supp. 2d at 1326, 1330-31. As such, the court held the exemptions at issue did not violate either clause because: (1) the Alaska and Hawaii exemptions were narrowly tailored

attempts by Congress to address the geographically isolated problem of those two places being heavily dependent on ocean transportation for domestic consumption; (2) the Columbia River "exemption" was more likely an oversight or a simple geographic distinction between "inland waterways" and "ports" and there was no evidence of actual benefit to the "exempted" ports; (3) the exemption of the inland waterway ports did not indicate any state or regional discrimination. Subsequently, the Court of International Trade applied these holdings to CF Industries and granted summary judgment in favor of the government. CF Indus., Inc. v. United States, No. 02-00281, 2002 Ct. Intl. Trade LEXIS 138, at *2 (Ct. Int'l Trade Nov. 26, 2002).

On appeal, Thomson challenges each holding of the trial court (except for the holding that the HMT was a tax) and CF Industries challenges the court's holding that the Alaska and Hawaii domestic exemptions do not violate the Uniformity or Port Preference Clause. The government supports the trial court's rulings and also argues that the HMT is a user fee rather than a tax. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

## DISCUSSION

We review the Court of International Trade's grant of summary judgment and conclusion of the constitutionality of the HMT de novo. Princess, 201 F.3d at 1357. We also review the interpretation of a statute, including questions of severability, de novo. Id.

### I

The trial court held that the import and domestic unloading portions of the HMT were severable from the unconstitutional export provision. Thomson, 219 F. Supp. 2d at 1324 (citing Amoco Oil, 234 F.3d at 1377; Princess, 201 F.3d at 1358; Carnival, 200 F.3d at 1361). Thomson argues that the prior decisions holding the HMT severable "should

not be treated as binding precedent" because: "The panel[s] in Princess [201 F.3d 1352] and Carnival [200 F.3d 1361] relied upon an observation that the World Trade Organization ("WTO") had not taken final action on whether the post-United States Shoe HMT on imports and not exports violated international agreements." Because the executive branch had already conceded in the WTO that there was a violation, Thomson argues, the basis for the panels' decisions was wrong. We disagree with Thomson and hold that our decisions in Princess and. Carnival are binding precedent on this panel.

Contrary to Thomson's argument, our prior decisions did not turn on the WTO's position on the HMT as applied to imports. Those decisions relied, instead, on the presence of a severability clause in the WRDA (of which the HMT was a part) and the fact that "the legislative history of the statute does not show that Congress would not have imposed the [HMT] without applying it to exports." Carnival, 200 F.3d at 1366-67. Indeed, in dismissing the specific argument that Congress did not intend to make the application of the HMT to exports severable from the HMT as applied to imports because of possible conflicts, this court first noted that, in a different case, the Court of International Trade had found the legislative history on point "'insufficient to rebut the strong presumption of severability.'" Id. at 1369 (citing Amoco Oil Co. v. United States, 63 F. Supp. 2d 1332, 1337 (Ct. Int'l Trade 1999)). Further, the court noted that if the WTO were to take final formal action against the import portion of the HMT and "the result [were] to create serious problems, either the executive or the legislative branch presumably will take appropriate action." Id. This latter statement makes evident the court's view that subsequent action by the WTO is irrelevant to the question of whether Congress would have enacted only the import provision, because the action by the WTO could only take place after Congress enacted the provision. In short, we are bound by

our precedent in Carnival to hold that the export provision of the HMT is severable from the remaining provisions of the statute.

II

The trial court held that the HMT as to imports and domestic unloadings is a "tax" rather than a "user fee."[2] Thomson, 219 F. Supp. 2d at 1325. The court applied the three-prong test prescribed by the Supreme Court in Massachusetts v. United States, 435 U.S. 444, 464 (1978): "(1) the charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of some system; and (3) the charge must be structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred." Thomson, 219 F. Supp. 2d at 1325 (citing Massachusetts, 435 U.S. at 464). The trial court held that the HMT, as applied to imports and domestic unloadings, failed the second and third prongs, relying entirely on the court's prior analysis of the HMT as applied to exports in United States Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995), aff'd, 114 F.3d 1564, 1574 (Fed. Cir. 1997), aff'd, 523 U.S. 360 (1998). Thomson, 219 F. Supp. 2d at 1325. In that case the trial court held that the HMT failed the second prong because low-value bulk importers use ports more, but pay less than high-value non-bulk importers and failed the third prong because the HMT is used to fund projects yet to be commenced, rather than repay the government for services rendered. United States Shoe, 907 F. Supp. at 415, 415 n.2.

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[2] This is a potentially dispositive point on the Uniformity Clause issue because if the HMT is held to be a user fee, the Uniformity Clause cannot apply, as it applies only to "duties, imposts, and excises." U.S. Const. Art. I, § 8, cl. 1.

On appeal the government argues that the trial court's reliance on United States Shoe was misplaced, as the standard and the analysis involving the Export Clause of the Constitution is far stricter than that involved in the Uniformity Clause.[3] Because of the different clauses at issue, and, consequently, the different standards applicable, the government argues that the HMT as applied to imports and domestic unloadings is a "user fee." We agree.

In United States Shoe this court applied the Massachusetts test to hold "that the HMT [as applied to exports] is not based on a fair approximation of use and, as such, is not a permissible user fee." United States Shoe, 114 F.3d at 1574. In doing so, this court distinguished United States v. Sperry Corp., 493 U.S. 52 (1989) (holding that a fee of 1.5% of all awards recovered from the Iran-United States Claims Tribunal was a valid user fee), based upon the fact that Sperry did not deal with a challenge under the Export Clause. United States Shoe, 114 F.3d at 1572-73. Indeed, this court specifically noted that the Supreme Court viewed the inquiry under the Export Clause as very strict. Id. at 1573 (citing United States v. Int'l Bus. Mach. Corp., 517 U.S. 843, 851-52 (1996) ("The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports.")).

The importance of the strictness of the Export Clause inquiry was confirmed by the Supreme Court's affirmance in United States Shoe. In affirming that decision, the court

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[3] Although the appellee in this appeal, the government is permitted to make this argument as an alternate basis for affirmance because the argument was raised below and is supported by the record. See Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.").

noted "IBM plainly stated that the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." United States Shoe, 523 U.S. at 368. The Supreme Court distinguished three other Supreme Court cases upholding ad valorem charges. as user fees solely because "[t]hose decisions involved constitutional provisions other than the Export Clause." Id. In addition, the Supreme Court did not even apply the Massachusetts test and instead relied on a different, more stringent standard specific to the Export Clause. Id. at 369-70 (applying the test announced in Pace v. Burgess, 92 U.S. 372, 375-76 (1872)). In sum, the Supreme Court's opinion not only makes clear the importance of the strictness of the Export Clause to its decision, it implicitly rejects this court's analysis under the Massachusetts test.

Now we must analyze the HMT, as applied to imports and domestic shipping under the more flexible Massachusetts test.[4] We first note that although many of the surface-level indicia point to the HMT as being a tax, Congress seemingly intended the HMT to be a user fee. United States Shoe, 114 F.3d at 1578-80 (Mayer, J., dissenting) (citing and quoting multiple. sources of legislative history, e.g., S. Rep. No. 99-126, at 7 (1985), reprinted in 1986 U.S.C.C.A.N. 6639, 6644 ("The taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels.")).

The first prong of the Massachusetts test asks whether the charge unfairly discriminates against the constitutionally-protected interest implicated by the charge. 435 U.S. at 464.

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[4] The HMT is codified in the Internal Revenue Code and refers to itself as a tax both in its title and in its body.

Neither appellant makes any argument under this prong, but we address it briefly. In this case, the only possible constitutional interests implicated are those embodied in the Uniformity and Port Preference Clauses. The charge itself, however, implicates neither -- it is only the exemptions in the HMT that possibly implicate either clause. That being the case, we do not see how the charge could be viewed as discriminating against any constitutionally-protected interest associated with either clause.

The second prong asks whether the charge is a fair approximation of the importers' and domestic shippers' use of United States harbors and ports. Id. Appellants argue that the HMT as applied to imports and domestic unloadings "does not correlate reliably with the federal harbor services used or usable." United States Shoe, 523 U.S. at 369. Appellants point us to the arguments embraced by this court in United States Shoe,' where the appellant in that case argued:

> [T]he amount of the HMT has no relationship to the size or weight of the vessel or the necessary depth of the port required by the vessel. . . . [E]ven though the bulk cargo exporters generally require a larger vessel and a deeper port, and therefore "use" the port to a greater extent, they pay a lower tax than high value, low bulk cargo exporters. Moreover, a ship that docks but does not load or unload cargo is not required to pay a fee, even though that ship otherwise utilizes the port. Additionally, there is apparently no correlation between the amount of fees collected at a particular port and the expenditure of funds from the Trust Fund to maintain that particular port.... Finally, it is not consistent with a true user fee that so many users are exempted, such

> as those carrying bunker fuel, ship's stores, equipment necessary for the operation of the vessel and fish and other aquatic animal life not previously landed on shore, since ships carrying these products use the port facilities to the same extent as ships carrying products subject to the HMT.

114 F.3d at 1572 (citations omitted). As noted above, because the cases show that ad valorem charges are generally upheld in contexts outside of the Export Clause and because this court's prior analysis depended upon the strictness of the inquiry in the Export Clause context, we disagree with appellants, and hold that the HMT as applied to imports and domestic unloadings is a fair approximation of the use of the ports.

To satisfy the second prong of the Massachusetts test, a user fee must only "reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." Evansville-Vanderburg Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 717 (1972). User fees need not "be precisely calibrated to the use that a party makes of government services." Sperry, 493 U.S. at 60. Indeed, "when the Federal Government applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system." Id. at 61. Nonetheless, the Supreme Court has "declined to impose a requirement that the Government 'give weight to every factor affecting appropriate compensation for [the corresponding use].'" Id. (quoting Massachusetts, 435 U.S. at 468 n.8). In addition, the Supreme Court has considered the administrative costs associated with a corresponding increase in the closeness of the approximation of use. Massachusetts, 435 U.S. at 466; Capital Greyhound Lines v. Brice, 339 U.S. 542, 546-47 (1950) ("Each additional factor adds to administrative burdens of enforcement . . . . We have

recognized that such burdens may be sufficient to justify . . . ignoring [key factors], although the result may be a tax which on its face appears to bear with unequal weight upon different carriers." (citations omitted)).

Applying those standards, we hold that the HMT's ad valorem charge is based upon a fair approximation of the cost of the benefits provided for port users. Although imperfect in its application, Congress rationally determined that value was "the only acceptable basis on which to impose such charges. This national uniform basis minimizes any possible disadvantages among cargo types and U.S. ports which otherwise might result from user charges." H.R. Rep. No. 99-228, at 5-6, reprinted in 1986 U.S.C.C.A.N. at 6710. Congress carefully considered the basis for the charge, hearing much testimony in favor of an ad valorem charge over a port-specific fee or a flat tonnage fee. See, e.g., Senate Comm. on Finance, Hearings 99-410, 99th Cong., 1st Sess. 47 (Sept. 10, 1985); House Comm. on Ways and Means, Hearing 99-36, 99th Cong., 1st Sess. 59 (Sept. 5, 1985). Congress also viewed the ad valorem basis as one that would minimize administrative costs associated with collection. See H.R. Rep. No. 99-228, at 10, reprinted in 1986 U.S.C.C.A.N. 6705, 6714. Further, the imperfections urged to be fatal here are no more severe than those attached to other charges that the Supreme Court has upheld in other cases. Sperry, 493 U.S. at 59-64 (upholding as a user fee a charge of 1.5% of awards recovered from the Iran-United States Claims Tribunal); Massachusetts, 435 U.S. at 467-70 (upholding as a. user fee an annual fee (varying depending on type and weight of the aircraft) on all civil aircraft that fly in the navigable U.S. airspace even though "not all aircraft make equal use of the federal navigational facilities or of the airports"); Evansville, 405 U.S. at 717-20 (upholding a user fee of one dollar per commercial airline passenger to pay for airport construction and maintenance even though the "measures exempt[ed] in whole or part a majority of the

actual number of persons who use facilities of the airports involved" because those exemptions were not "wholly unreasonable"); Greyhound Lines, 339 U.S. at 545 (upholding as a user fee a highway tax of "2% upon the fair market value of motor vehicles used in interstate commerce"); see also Alamo Rent-A-Car, Inc. v. City of Palm Springs, 955 F.2d 30, 30-31 (9th Cir. 1992) (upholding as a user fee a charge of 7% of a car rental company's gross receipts from car rental customers it picked up at an airport); Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth., 906 F.2d 516, 518-21 (11th Cir. 1990) (upholding as a user fee a charge of 10% of a car rental company's gross receipts from car rental customers it picked up at an airport).

Turning now to the third prong, we hold that the HMT is not excessive in relation to the expenditures by the government. See Massachusetts, 435 U.S. at 434. The trial court held that this prong was not met solely because the HMT is used to fund future projects and not to repay the government for services rendered. Thomson, 219 F. Supp. 2d at 1325. This failing, however, is not fatal to the HMT's status as a user fee. The HMT's (and the corresponding trust fund's) purpose is to provide for the operation and maintenance of channels and harbors. This is certainly a long-term project and must have been viewed as such. Given the nature of the problem the HMT addresses, it seems inconsequential and indeed unavoidable that the HMT pays for future programs. Alamo, 906 F.2d at 522 ("[G]iven the long term nature of maintaining and developing an airport, it was appropriate . . . to factor in future development plans when setting user fees."); see also Massachusetts, 435 U.S. at 470 n.25 ("[A] surplus of revenue over outlays in any one year can be offset against actual deficits in past years and perhaps against projected deficits of future years."). Further, no HMT funds can be used for any purpose other than the operation and maintenance of channels and harbors (or related costs), meaning the funds will always be used to

continue the benefits of the services previously provided. 26 U.S.C. § 9505. Indeed, in upholding other charges as user fees, the Supreme Court has noted that the fees were deposited in a dedicated trust fund to cover only the expense of government facilities or services. See, e.g., Morgan's La. & T.R. & S.S. Co. v. Bd. of Health, 118 U.S. 455, 461 (1886); Head Money Cases, 112 U.S. 580, 596 (1884).

In sum, because the HMT as applied to imports and domestic unloadings is a valid user fee and not a tax, we hold that it is outside the scope of the Uniformity Clause's prohibitions.

III

The trial court held that the Port Preference Clause prohibits only deliberate discrimination against the ports in one or more states and in favor of others. Thomson, 219 F. Supp. 2d. at 1330-31. Appellants argue the trial court erred in its interpretation, and that the Clause prohibits any positive legislation intended to produce a direct privilege or preference favoring the ports of any particular state over those of another. That is the case here, appellants argue, because the HMT gives preference to the ports of Alaska and Hawaii by exempting domestic unloadings in those two states from HMT liability.[5] We disagree and hold that the trial court properly interpreted and applied the Port Preference Clause.

The Port Preference Clause reads: "No preference shall be given by any regulation of Commerce or Revenue to the

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[5] In its briefing Thomson argues the Port Preference Clause is violated by the exemptions of a 47.5 mile segment of the Columbia River and inland waterways. However, as neither of those exemptions gives express preference to the ports of one state over another, we reject those arguments out of hand. See Penn. v. Wheeling & Belmont Bridge Co., 59 U.S. 421, 435 (1856). Appellants make no argument addressing the exemption for ports in the United States' possessions.

Ports of one State over those of another." U.S. Const. Art. I, § 9, cl. 6. The Clause was proposed by Maryland's delegate to the Constitutional Convention, Luther Martin, who worried that Congress "might favor the ports of particular States, by requiring vessels to or from other States to enter & clear thereat, as vessels belonging or bound to Baltimore, to enter & clear at Norfolk." 2 Max Farrand, The Records of the Federal Convention of 1787, 417 (1966). Martin later opposed the Clause because it dealt only with express preferences and left states to bear the effects of other rules. Luther Martin, Genuine Information (1788), reprinted in Philip B. Kurland & Ralph Lerner, 3 The Founders' Constitution 372 (1987). In interpreting the clause, the Supreme Court has stated, "what is forbidden is not discrimination between individual ports within the same or different states, but discrimination between states." Penn, v. Wheeling & Belmont Bridge Co., 59 U.S. 421, 435 (1856). That decision and other decisions interpreting the Clause make clear only that the Clause does not prohibit a facially nondiscriminatory law that has incidental, disparate effects on ports of one or more states. E.g., Wheeling, 59 U.S. at 433-36; Armour Packing Co. v. United States, 209 U.S. 56, 80 (1908); La. Pub. Serv. Comm'n v. Tex. & New Orleans R.R., 284 U.S. 125,131 (1931); City of Houston v. Fed. Aviation Admin., 679 F.2d 1184, 1197-98 (5th Cir. 1982); City of Milwaukee v. Yeutter, 877 F.2d 540, 546-47 (7th Cir. 1989).

Appellants argue from this case law that the Clause prohibits all express preferences for the ports of one state over the ports of another. Their logic is flawed. The above-cited decisions support only the proposition that a facially nondiscriminatory statute that causes disparate effects does not violate the Clause. This is simply not an issue in this case. The cases do not support the proposition that a statute with explicit exemptions of states to prevent disparate effects violates the Clause. These are two entirely different issues.

We are directed to no case holding directly supporting the trial court's interpretation of the clause either. One somewhat instructive statement, however, comes from the United States Court of Appeals for the Fifth Circuit:

> Government actions do not violate the Clause even if they result in some detriment to the port of a state, where they occur (i) as an incident to some otherwise legitimate government act regulating commerce or (ii) more as a result of the accident of geography than from an intentional government preference.

Houston, 679 F.2d at 1197 (emphasis added). Although the holding in Houston does not address the issue in this appeal, we see a strong implication, particularly from prong (ii) of the announced test, that geography can play a role. so long as it is not indicative of an intentional preference. In addition, a recent statement by Justice Thomas offers some support, although it is quite clearly not a holding of, the Supreme Court. United States v. Lopez, 514 U.S. 549, 587 (1995) (Thomas, J., concurring) ("Although it is possible to conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the [Port Preference] Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports."). The statement of the Fifth Circuit and Justice Thomas's views comport with the historic purpose for including the clause in the Constitution: "[It] gave small states [e.g., Maryland] protection against deliberate discrimination against them by other, more powerful states [e.g., Virginia]." Houston, 679 F.2d at 1198. Therefore, we hold that the better view of the Port Preference Clause is that it prohibits only intentional, effectual preference of the ports of one state over ports of another state, advantaging certain states' ports by disadvantaging other states' ports.

That being the case, we hold that the exemptions at issue here are not the sort of preference prohibited by the Clause. Instead, Congress crafted a narrow exemption to alleviate a disproportionate incidence of the tax on Alaska and Hawaii as a result of their heavy reliance on domestic shipping. As a starting point, we note that there was ample evidence in the legislative history supporting Congress' view that the vast geographical separation of the exempted states from the "lower forty-eight states" was a complication that made Alaska and Hawaii heavily dependent on domestic shipping (as opposed to other forms of transportation of goods). E.g., Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985: Hearing on H.R. 6 Before the House Committee on Ways and Means, 99th Cong. 30 (1985) ("Virtually everything in and out of [Hawaii] must travel by ship. . . . A port user fee, therefore, would be levied on over 80% of all the states goods and materials."); 132 Cong. Rec. 52739-02, S2825 (daily ed. Mar. 14, 1986) ("Surface transportation in Alaska is almost exclusively waterborne. For much of Alaska waterborne shipping is the only way to get materials to communities where they will be used."). To solve this problem, the exemption then, only applies to domestic unloadings, not imports or exports. 26 U.S.C. § 4462(b). Thus, no advantage arises for international shipping to and from ports of these states, because there is no indication that Alaska and Hawaii are more dependent on international shipping than any other states. In addition, the exemption also applies to "possessions" of the United States, id., such as Puerto Rico or Guam which are also geographically isolated, confirming that the exemption was designed to minimize disadvantages inherent in applying the HMT to domestic cargo of distant ports because of their geographic isolation -- namely greatly increased dependence of those entities on domestic shipping. Lastly, the exemption also applies to ports receiving shipments from Alaska and Hawaii, meaning that there are

exempted unloadings (potentially) in the ports of all states. Id. In short, it is clear that the intent and effect of the exemption was not to provide a preference to the ports of the exempted states at the expense of the ports of other states, but rather to provide some relief from the disparate effects the HMT would have had on the shipping-dependent states and possessions.

Second, and apart from our determination that Congress did not intend an illicit preference to be given to Alaska or Hawaii, we find it difficult to discern an actual preference for those ports. It is true that domestic shipments -- except for crude oil shipments out of Alaska -- that arrive in the ports of those states will not be subject to HMT liability. Id. It is also true that the ports of both states are geographically isolated and as such are more heavily dependent on domestic shipping to receive goods. This isolation, however, also makes it difficult to imagine domestic shippers deliberately routing cargo to a port in Alaska or Hawaii as an intermediate stop (say, on a shipment from Long Beach to Seattle) in order to avoid HMT liability. In that respect, it is hard to view this exemption as one that will channel commerce through the ports of one state to the detriment of the ports in other states. In addition, the express exemption also applies to domestic cargo shipped from ports in Alaska and Hawaii and therefore exempts certain domestic unloadings in ports of other states from liability. Thus, the exemption applies not only in the ports of Alaska and Hawaii, but also in the ports of any state that receives shipments from the ports of Alaska or Hawaii. In those circumstances, the ports of other states are given the same advantage (no HMT liability) as the ports in Alaska or Hawaii.

Lastly, we note that the exemptions were expressed using two states' names does not in itself indicate that Congress intended or effected a preference to the ports of

those states. Congress merely used the convenience of naming those states, rather than devising a formulation that would somehow include all states and possessions within a certain class -- i.e., those that are geographically distant from the lower fortyeight states and that lack a plausible alternative to ocean shipping. In essence, naming the states and possessions as exempted merely served as a proxy for a complex formula defining excessive isolation causing a greater dependency on domestic cargo than that experienced by other coastal states.

In sum, we conclude that the exemption of HMT liability for domestic unloadings at the ports in. Alaska and Hawaii (and U.S. possessions) and at any other port in the U.S. when the shipment is from a port in Alaska and Hawaii (or U.S. possession), does not give a preference to the ports of Alaska and Hawaii that violates the prohibition of the Port Preference Clause.

## CONCLUSION

In conclusion, we affirm the trial court's decisions in both appeals because we hold that the HMT as applied to imports and domestic unloadings is not a tax but a user fee making the Uniformity Clause inapplicable, and because we hold that the various exemptions in the HMT do not violate the Port Preference Clause of the Constitution.

AFFIRMED

Slip Op. 02- 138

UNITED STATES COURT OF INTERNATIONAL TRADE

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| CF INDUSTRIES, INC. | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Court No. 02-00281 |
| | ) | |
| UNITED STATES, | ) | |
| | ) | |
| Defendant. | ) | |

[Harbor Maintenance Tax on domestic shipments is not unconstitutional under The Port Preference or Uniformity Clauses.]

Dated: November 26, 2002

McKenna Long & Aldridge L.L.P. (Peter Buck Feller and Daniel G. Jarcho) for plaintiff.

Robert D. McCallum. Jr., Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Jeanne E. Davidson, Todd M. Hughes, and Jeffrey A. Belkin), Richard McManus, Office of General Counsel, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, Judge:

This action seeking refunds of Harbor Maintenance Taxes ("HMT") on domestic shipments is before the court on defendant's USCIT Rule 12(b)(5) motion to dismiss and plaintiff's Rule 56 motion for summary judgment.

Plaintiff CF Industries is a Florida manufacturer of fertilizer. Plaintiff's fertilizer is shipped to Davant, Louisiana where it is placed on river barges. Shipments loaded or unloaded at Davant, Louisiana are subject to HMT. Plaintiff paid such taxes. There is no dispute that plaintiffs suit is timely and that the court has jurisdiction under 28 U.S.C. § 1581(i).

The issues of law before the court are no different than those presented in previously concluded suits by importers. Accordingly, for the reasons stated in Thomson Multimedia. Inc. v. United States, 219 F. Supp. 2d 1322 (Ct. Int'l Trade 2002), the court grants defendant's motion to dismiss for failure to state a claim and denies plaintiffs motion for summary judgment. There is no significant argument raised by plaintiff here that was not considered by the court in that case.

The court notes specifically that its reliance on United States v. Ptasynski, 462 U.S. 74 (1983), in finding no violation of the Port Preference Clause and Uniformity Clause of the Constitution (U.S. Const. art. I, § 9, cl. 6 and § 8, cl. 1) is not undermined by plaintiffs attempt to distinguish that case here. The fact that the United States advised the Supreme Court in its briefs that no windfall profits would accrue to certain Alaskan oil producers and thus, the tax exemption could have been accomplished in other ways, does not alter the fact that the tax exemption was defined in geographic terms. The holding of Ptasynski is not as narrow as plaintiff contends. Furthermore, the fact remains that, but for the applicable HMT exemption, the HMT would discriminate against domestic shipments to and from Alaska and Hawaii, two states which are not contiguous to the other forty-eight states. When drafting these clauses to address specific problems, the founding fathers knew nothing of this unique geographic expansion of the United States and cannot be said to have intended to prohibit the remedial measures

challenged here. In practical terms, the exemptions help to avoid preferences and promote uniformity.

Judgment will be entered for the United States.

/s/
Jane A. Restani
JUDGE

Dated: New York, New York.

This 26th day of November, 2002.

UNITED STATES COURT OF INTERNATIONAL TRADE

| | | |
|---|---|---|
| CF INDUSTRIES, INC. | ) | |
| Plaintiff, | ) | |
| | ) | Before: RESTANI, Judge |
| v. | ) | Court No. 02-00281 |
| | ) | |
| UNITED STATES, | ) | |
| | ) | |
| Defendant. | ) | |

**JUDGMENT**

This case having been submitted for decision and the Court, after deliberation, having rendered a decision therein; now, in conformity with that decision,

IT IS HEREBY ORDERED that this action is dismissed.

/s/
Jane A. Restani
JUDGE

Dated: New York, New York

This 26th day of November, 2002.

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgment was entered in the docket of this action, and was served upon the parties oh the date shown below.

Service was made by depositing a copy of this order or judgment, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail receptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney of record, for each party at the address on the official docket in this action, except that service upon, the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clerical employee designated, by the Attorney-In-Charge in a writing filed with the clerk of the court.

Leo M. Gordon
Clerk of the Court

Date: 11-26-02

By: /s/
Deputy Clerk

U.S. CONSTITUTION, art. I, § 8, cl. 1

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

U.S. CONSTITUTION, art. I, § 9, cls. 4, 5 and 6

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

Internal Revenue Code

26 U.S.C. § 4461. Imposition of tax

(a) General rule.--There is hereby imposed a tax on any port use.

(b) Amount of tax.--The amount of the tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.

(c) Liability and time of imposition of tax.

(1) Liability.--The tax imposed by subsection (a) shall be paid by-

(A) in the case of cargo entering the United States, the importer,

(B) in the case of cargo to be exported from the United States, the exporter, or

(C) in any other case, the shipper.

(2) Time of imposition.--Except as provided by regulations, the tax imposed by subsection (a) shall be imposed-

(A) in the case of cargo to be exported from the United States, at the time of loading, and

(B) in any other case, at the time of unloading.

Internal Revenue Code

26 U.S.C. § 4462. Definitions and special rules

(a) Definitions.--For purposes of this subchapter--

(1) Port use.--The term "port use" means-

(A) the loading of commercial cargo on, or

(B) the unloading of commercial cargo from, a commercial vessel at a port.

(2) Port.-

(A) In general.--The term "port" means any channel or harbor (or component thereof) in the United States, which-

(i) is not an inland waterway, and

(ii) is open to public navigation.

(B) Exception for certain facilities.--The term "port" does not include any channel or harbor with respect to which no Federal funds have been used since 1977 for construction, maintenance, or operation, or which was deauthorized by Federal law before 1985.

(C) Special rule for Columbia River: -The term "port" shall include the channels of the Columbia River in the States of Oregon and Washington only up to the downstream side of Bonneville lock and dam.

(3) Commercial cargo.-

(A) In general.--The term "commercial cargo" means any cargo transported on a commercial vessel, including passengers transported for compensation or hire.

(B) Certain items not included.--The term "commercial cargo" does not include-

(i) bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or

(ii) fish or other aquatic animal life caught and not previously landed on shore.

(4) Commercial vessel.-

(A) In general.--The term "commercial vessel" means any vessel used-

(i) in transporting cargo by water for compensation or hire, or

(ii) in transporting cargo by water in the business of the owner, lessee, or operator of the vessel.

(B) Exclusion of ferries.-

(i) In general.--The term "commercial vessel" does not include any ferry engaged primarily in the ferrying of passengers (including their vehicles) between points within the United States, or between the United States and contiguous countries.

(ii) Ferry.--The term "ferry" means any vessel which arrives in the United States on a regular schedule during its operating season at intervals of at least once each business day.

(5) Value.-

(A) In general.--The term "value" means, except as provided in regulations, the value of any commercial cargo as determined by standard commercial documentation.

(B) Transportation of passengers.--In the case of the transportation of passengers for hire, the term "value" means the actual charge paid for such service or the prevailing charge for comparable service if no actual charge is paid.

(b) Special rule for Alaska, Hawaii, and possessions.-

(1) In general.--No tax shall be imposed under section 4461(a) with respect to-

(A) cargo loaded on a vessel in a port in the United States mainland for transportation to Alaska, Hawaii, or any possession of the United States for ultimate use or consumption in Alaska, Hawaii, or any possession of the United States,

(B) cargo loaded on a vessel in Alaska, Hawaii, or any possession of the United States for transportation to the United States mainland, Alaska, Hawaii, or such a possession for ultimate use or consumption in the United States mainland, Alaska, Hawaii, or such a possession,

(C) the unloading of cargo described in subparagraph (A) or (B) in Alaska, Hawaii, or any possession of the United States, or in the United States mainland, respectively, or

(D) cargo loaded on a vessel in Alaska, Hawaii, or a possession of the United States and unloaded in the State or possession in which loaded, or passengers transported on United States flag vessels operating solely within the State waters of Alaska or Hawaii and adjacent international waters.

(2) Cargo does not include crude oil with respect to Alaska.--For purposes of this subsection, the term

"cargo" does not include crude oil with respect to Alaska.

(3) United States mainland.--For purposes of this subsection, the term "United States mainland" means the continental United States (not including Alaska).

(c) Coordination of tax where transportation subject to tax imposed by section 4042.--No tax shall be imposed under this subchapter with respect to the loading or unloading of any cargo on or from a vessel if any fuel of such vessel has been (or will be) subject to the tax imposed by section 4042 (relating to tax on fuel used in commercial transportation on inland waterways).

(d) Nonapplicability of tax to certain cargo.

(1) In general.--Subject to paragraph (2), the tax imposed by section 4461(a) shall not apply to bonded commercial cargo entering the United States for transportation and direct exportation to a foreign country.

(2) Imposition of charges.--Paragraph (1) shall not apply to any cargo exported to Canada or Mexico-

(A) during the period-

(i) after the date on which the Secretary determines that the Government of Canada or Mexico (as the case may be) has imposed a substantially equivalent tax, fee, or charge on commercial vessels or commercial cargo utilizing ports of such country, and

(ii) subject to subparagraph (B), before the date on which the Secretary determines that such tax, fee, charge has been discontinued by such country, and

(B) with respect to a particular United States port (or to any transaction or class of transactions at any such port) to the extent that the study made pursuant to section 1407(a) of the Water Resources Development Act of 1986 (or a review thereof pursuant to section 1407(b) of such Act) finds that--

(i) the imposition of the tax imposed by this subchapter at such port (or to any transaction or class of transactions at such port) is not likely to divert a significant amount of cargo from such port to a port in a country contiguous to the United States, or that any such diversion is not likely to result in significant economic loss to such port, or

(ii) the nonapplicability of such tax at such port (or to any transaction or class of transactions at such port) is likely to result in significant economic loss to any other United States port.

(e) Exemption for United States.--No tax shall be imposed under this subchapter on the United States or any agency or instrumentality thereof.

(f) Extension of provisions of law applicable to customs duty.-

(1) In general.--Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty. For purposes of the preceding sentence, any penalty expressed in terms of a relationship to the amount of the duty shall be treated as not less than the amount

which bears a similar relationship to the value of the cargo.

(2) Jurisdiction of courts and agencies.--For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty.

(3) Administrative provisions applicable to tax law not to apply.--The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes.

(g) Special rules.--Except as provided by regulations--

(1) Tax imposed only once.--Only 1 tax shall be imposed under section 4461(a) with respect to the loading on and unloading from, or the unloading from and the loading on, the same vessel of the same cargo.

(2) Exception for intraport movements.--Under regulations, no tax shall be imposed under section 4461(a) on the mere movement of cargo within a port.

(3) Relay cargo.--Only 1 tax shall be imposed under section 4461(a) on cargo (moving under a single bill of lading) which is unloaded from one vessel and loaded onto another vessel at any port in the United States for relay to or from any port in Alaska, Hawaii, or any possession of the United States. For purposes of this paragraph, the term "cargo" does not include any item not treated as cargo under subsection (b)(2).

(h) Exemption for humanitarian and development assistance cargos.--No tax shall be imposed under this subchapter on any nonprofit organization or cooperative for cargo which is owned or financed by such nonprofit organization or cooperative and which is certified by the United States Customs Service as intended for use in humanitarian or development assistance overseas.

(i) Regulations.--The Secretary may prescribe such additional regulations as may be necessary to carry out the purposes of this subchapter including, but not limited to, regulations--

(1) providing for the manner and method of payment and collection of the tax imposed by this subchapter,

(2) providing for the posting of bonds to secure payment of such tax,

(3) exempting any transaction or class of transactions from such tax where the collection of such tax is not administratively practical, and

(4) providing for the remittance or mitigation of penalties and the settlement or compromise of claims.

EXCERPTS FROM ORAL ARGUMENT OF
JULY 17, 2002

UNITED STATES COURT OF INTERNATIONAL
TRADE

| | | |
|---|---|---|
| THOMSON MULTIMEDIA, INC., | ) | |
| | ) | Court Number |
| Plaintiff, | ) | 95-00277 |
| | ) | |
| Against | ) | |
| | ) | ORAL ARGUMENT |
| THE UNITED STATES, | ) | July 17, 2002 |
| | ) | |
| Defendant. | ) | |

One Federal Plaza
New York, New York 10278

B E F O R E:

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* * * *

purpose. You might think about his argument there.

But, my problem with *Ptasynski is* that it's a Uniformity Clause case.

MR. BELKIN: Right.

THE COURT: I didn't see any case like *Ptasynski* under Port Preference. There's so few Port Preference cases.

So, how could -

MR. BELKIN: Well, we -

THE COURT: -- I apply *Ptasynski* to Port Preference?

MR. BELKIN: If -- if you look at the Port Preference Clause, the purpose is very clear that it's to avoid regulations or statutes being imposed on certain ports, and not others, of particular states. No preference shall be given by any regulation of Commerce or Revenue to the ports of one state over those of another.?

THE COURT: Now, this sounds more geographic than the Uniformity Clause, actually.

MR. BELKIN: It's even -- it -- because of the language, and because of the -- the language that was actually quoted by opposing counsel from the *Milwaukee* case, it's been determined that it has to be intentional discrimination against a particular state's ports.

THE COURT: Well, how is Congress going to show intentional discrimination, other than saying,? We favor Hawaii and Alaska??

MR. BELKIN: Well, that's exactly the point, Your Honor. That's why this clause has never been used to strike down a -- a statute or a regulation. It's essentially a dead letter.

There was a fear, when the Constitution was first adopted that Congress would favor certain states over others. But because we have now a national -- a strong national government, with international obligations, and shipping, and concerns that -- that are cross-border, that there really is no concern any more that Congress is going to favor -- I mean, Virginia over Maryland. And, that's why intentional, explicit discrimination is required.

What ports -

THE COURT: Well, actually,

MR. BELKIN: Well, what -

THE COURT: -- Congress does favor one state over another, all the time, in different bills.

MR. BELKIN: Right, but we're talking about

* * * *

Supreme Court, U.S.
FILED
APR 15 2004
OFFICE OF THE CLERK

No. 03-867

# In the Supreme Court of the United States

CF INDUSTRIES, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

## QUESTIONS PRESENTED

1. Whether the Harbor Maintenance Tax (HMT), 26 U.S.C. 4461-4462, as applied to domestic shipping, violates the Uniformity Clause, U.S. Const. Art. I, § 8, Cl. 1.

2. Whether the HMT, as applied to domestic shipping, violates the Port Preference Clause, U.S. Const. Art. I, § 9, Cl. 6.

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# In the Supreme Court of the United States

No. 03-867

CF INDUSTRIES, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A20) is reported at 340 F.3d 1355. The opinion of the Court of International Trade (Pet. App. A21-A23) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 18, 2003 (Pet. App. A1). On November 10, 2003, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 16, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Congress enacted the Harbor Maintenance Tax (HMT) as part of the Water Resources Development Act (WRDA) of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (33 U.S.C. 2201 *et seq.*). The HMT imposes a fee "on any port use" by commercial importers, exporters, domestic shippers, and passenger liners. 26 U.S.C. 4461(a). For shipments of goods, the amount of the HMT is set at "0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(b). The purpose of the HMT is to require the entities that benefit from use of port facilities to share the burden of the costs borne by the United States in maintaining those facilities. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985). The fees collected by the United States are paid into the Harbor Maintenance Trust Fund and thereafter expended on the operation and maintenance of channels and harbors throughout the United States. 26 U.S.C. 9505(a) and (c).

2. In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), this Court held that the HMT, as applied to shipments of exports, violates the Export Clause, which states that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5. The Court recognized that the Export Clause imposes no bar against an appropriate port use fee (523 U.S. at 367), and emphasized that exporters are not "exempt from any and all user fees designed to defray the cost of harbor development and maintenance" (*id.* at 370). The Court held that *Pace* v. *Burgess*, 92 U.S. 372 (1876), governs the determination whether an assessment "constitutes a bona fide user fee in the Export Clause context." 523 U.S. at 369. The Court explained that the more flexible test for identify-

ing user fees applied in *Massachusetts* v. *United States*, 435 U.S. 444 (1978), is applicable under "constitutional provisions other than the Export Clause," because "the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." 523 U.S. at 368.

The Court concluded that the HMT, as applied to exports, fails to satisfy the strict test for a bona fide user fee applicable under the Export Clause, because the value of a shipment's cargo, which determines the amount of the HMT, does not adequately correlate with the extent to which an exporter uses federal harbor services, facilities, and benefits. 523 U.S. at 367-370. The Court therefore held that the HMT, as applied to exports, is a tax barred by the Export Clause. *Ibid.* The Court recognized, however, that *ad valorem* assessments that amount to an invalid "tax or duty" under the Export Clause might nonetheless qualify as a valid user fee under other constitutional provisions. *Id.* at 368-369 (citing, *inter alia*, *United States* v. *Sperry Corp.*, 493 U.S. 52, 60 (1989), which upheld an *ad valorem* fee against a Takings Clause challenge on the ground that the Court has "never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services").

3. Petitioner, a Florida manufacturer of fertilizer, pays the HMT when its shipments of fertilizer are shipped to Davant, Louisiana, and unloaded there to be placed on river barges. Pet. App. 22a. On April 10, 2002, petitioner filed this action in the Court of International Trade, alleging that the HMT, as applied to domestic shipments, violates the Uniformity Clause, U.S. Const. Art. I, § 8, Cl. 1, and the Port Preference Clause, U.S. Const. Art. I, § 9, Cl. 6. Pet. 4. On Novem-

ber 26, 2002, the court granted judgment in favor of the government, Pet. App. 21a-23a, relying on its previous decision in *Thomson Multimedia, Inc.* v. *United States*, 219 F. Supp. 2d 1322 (Ct. Int'l Trade 2002), aff'd, 340 F.3d 1355 (Fed. Cir. 2003), petition for cert. pending, No. 03-882 (filed Dec. 16, 2003), which had rejected analogous challenges to the HMT brought by an importer.

a. The Uniformity Clause states that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. Art. I, § 8, Cl. 1. Petitioner argued that the HMT, as applied to domestic shipping, is a tax subject to the Uniformity Clause rather than a user fee, and that the HMT is not "uniform" under the Clause because it contains a limited exemption for unloading of domestic consumable merchandise (excluding Alaskan crude oil) shipped between the continental United States and Alaska, Hawaii, or United States possessions, 26 U.S.C. 4462(b). In its opinion in *Thomson*, the Court of International Trade ruled that the HMT, as applied to imports, constitutes a tax rather than a bona fide user fee. 219 F. Supp. 2d at 1325. But the court concluded that the HMT's application to imports nonetheless does not infringe the Uniformity Clause because there was no evidence of actual regional favoritism or discrimination with respect to the exemption for domestic cargo shipped between the continental United States and Alaska, Hawaii, or United States territories. *Id.* at 1327-1328. The court adhered to that ruling in this case in rejecting petitioner's claim under the Uniformity Clause. Pet. App. 22a.

b. In *Thomson*, the court also rejected a claim that the HMT's domestic cargo exemption for Alaska, Hawaii, and United States territories violates the Port Preference Clause, which states that "No Preference

shall be given * * * to the Ports of one State over those of another," U.S. Const. Art. I, § 9, Cl. 6. See 219 F. Supp. 2d at 1331-1332. The court held that any benefit or detriment to the ports of certain States as a result of the domestic cargo exemption does not amount to illicit geographic discrimination between States in violation of the Port Preference Clause. *Ibid.* As with petitioner's claim under the Uniformity Clause, the court in this case adhered to *Thomson* in rejecting petitioner's claim under the Port Preference Clause. Pet. App. 22a.

4. The court of appeals affirmed. Pet. App. 2a-20a.[1]

a. The court of appeals held that the HMT, as applied to domestic shipping, does not violate the Uniformity Clause. Pet. App. 8a-15a. Whereas the Court of International Trade had found in *Thomson* that the HMT is a tax subject to the Uniformity Clause but does not run afoul of the Clause's uniformity standard, the court of appeals concluded that the HMT's application to domestic shipping is a bona fide user fee rather than a tax and thus falls outside the scope of the Clause altogether. The court of appeals, relying on this Court's opinion in *United States Shoe*, reasoned that because this case does not involve a challenge under the Export Clause, the less stringent standard for a bona fide user fee prescribed by *Massachusetts*, 435 U.S. at 464, governs the analysis. Pet. App. 9a-10a. Observing that "*ad valorem* charges are generally upheld in contexts outside of the Export Clause," the court concluded "that the HMT's *ad valorem* charge is based upon a fair

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[1] The court of appeals issued a single opinion resolving both the appeal in this case and the appeal in *Thomson*. Thomson filed a separate petition for a writ of certiorari on December 16, 2003 (No. 03-882), and the government has filed a brief in opposition to that petition.

approximation of the costs of the benefits provided for port users." *Id.* at 12a-13a. Having found that the HMT, as applied to domestic shipping, constitutes a bona fide user fee, the court had no occasion to address the substantive scope of the Uniformity Clause.

b. The court of appeals also upheld the HMT's application to domestic shipping against petitioner's challenge under the Port Preference Clause. Pet. App. 15a-20a. The court explained that the Port Preference Clause "prohibits only intentional, effectual preference of the ports of one state over ports of another state, advantaging certain states' ports by disadvantaging other states' ports." *Id.* at 17a. The court held that the HMT's domestic cargo exemption for Alaska, Hawaii, and United States possessions does not infringe the Port Preference Clause, because it was "clear that the intent and effect of the exemption was not to provide a preference to the ports of the exempted states at the expense of the ports of other states, but rather to provide some relief from the disparate effects the HMT would have had on shipping-dependent states and possessions." *Id.* at 19a. The court further explained that the exemption applies not only in the ports of Alaska and Hawaii, but also in the ports of any state when receiving shipments from Alaska and Hawaii. The court thus found it "difficult to discern an actual preference" for the ports of those States, as opposed to a recognition "that the ports of both states are geographically isolated and as such are more heavily dependent on domestic shipping to receive goods." *Ibid.*[2]

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[2] The court observed that there was no significance to the fact that the HMT singles out Alaska and Hawaii by name, explaining that naming the two States (as well as United States possessions) "merely served as a

## ARGUMENT

The court of appeals correctly held that the HMT, as applied to domestic shipping, falls outside the scope of the Uniformity Clause because it qualifies as a user fee for purposes of that Clause, and that the HMT's exemption for domestic cargo (excluding Alaskan crude oil) shipped to and from Alaska, Hawaii, and United States possessions does not violate the Port Preference Clause. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review therefore is unwarranted.

1. Petitioner contends (Pet. 8-25) that the HMT, as applied to domestic shipping, is a tax subject to the Uniformity Clause rather than a bona fide user fee. That contention lacks merit and was correctly rejected by the court of appeals.

a. Congress intended for the HMT to be a user fee rather than a tax. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 7 (1985) ("The taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels.").[3] Because this case concerns the application of the HMT to domestic shipping rather than to exports, the court of appeals, following this

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proxy for a complex formula defining excessive isolation causing a greater dependency on domestic cargo than that experienced by other coastal states." Pet. App. 20a.

[3] Although the HMT is referred to as a "tax," 26 U.S.C. 4461, that of course is not dispositive of whether the HMT qualifies as a bona fide user fee. See *United States Shoe*, 523 U.S. at 367 ("[W]e must regard things rather than names * * * in determining whether an imposition on exports ranks as a tax.") (citation and internal quotation marks omitted).

Court's direction in *United States Shoe*, 523 U.S. at 367-368, applied the framework prescribed by *Massachusetts* v. *United States*, 435 U.S. 444 (1978), for determining (outside the context of the Export Clause) whether an assessment constitutes a bona fide user fee. See pp. 2-3, *supra*. The *Massachusetts* test provides that assessments constitute valid user fees "so long as they (1) do not discriminate against [the constitutionally-protected interest], (2) are based upon some fair approximation of use, and (3) are not shown to be excessive in relation to the cost to the government of the benefits conferred." 435 U.S. at 464. The court of appeals correctly found that the HMT, as applied to domestic shipping, satisfies each prong of the test, Pet. App. 10a-15a, and petitioner makes no argument in this Court that the court of appeals erred in how it applied the *Massachusetts* framework.

With respect to the first prong, the court of appeals found that the HMT charge itself could not "be viewed as discriminating against any constitutionally-protected interest" because "it is only the exemptions in the HMT that possibly implicate either" the Uniformity or Port Preference Clauses. Pet. App. 10a-11a. With respect to the second prong, the court explained that "a user fee must only 'reflect a fair, if imperfect, approximation of the use of facilities.'" *Id.* at 12a (quoting *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 717 (1972)). That standard was met by the HMT's *ad valorem* charge as applied to domestic shipping, the court explained, because Congress heard "much testimony in favor of an *ad valorem* charge" over other charges, Congress found that an *ad valorem* charge would "minimize administrative costs," and, although the uniform *ad valorem* charge is "imperfect in its application, Congress rationally determined that

[it] was 'the only acceptable basis on which to impose such charges'" because it "minimizes any possible disadvantages among cargo types and U.S. ports which otherwise might result from user charges." *Id.* at 13a (quoting H.R. Rep. No. 228, 99th Cong., 2d Sess. 5-6 (1986)). Finally, with respect to the third prong, the court explained that the HMT is not excessive in relation to the cost of the federal services, because, as with other assessments upheld by this Court as user fees, HMT collections are deposited in a designated trust fund and can be used only for the operation and maintenance of harbors and channels. Pet. App. 14a.

b. Petitioner asserts (Pet. 9-13) that the holding of this Court in *United States Shoe* that the HMT, as applied to exports, constitutes a tax rather than a bona fide user fee under the Export Clause, is controlling in this case in determining whether the HMT, as applied to domestic shipping, qualifies as a valid user fee under the Uniformity Clause. That contention lacks merit.

The Court made clear throughout its opinion in *United States Shoe* that its analysis applied only under the Export Clause. Indeed, the Court specifically emphasized that the "Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." 523 U.S. at 368. The Court therefore applied *Pace* v. *Burgess*, 92 U.S. 372 (1876), "[t]he guiding precedent for determining what constitutes a bona fide user fee *in the Export Clause context*." 523 U.S. at 369 (emphasis added). The Court ultimately concluded that "*Pace* establishes that, *under the Export Clause*, the connection between a service the Government renders and the compensation it receives * * * must be closer than is present here" in order for the charge to qualify as a bona fide user fee.

*Ibid.* (emphasis added). That conclusion was explicitly confined to the particular context of claims arising under the Export Clause, and it has no application here. In cases involving "constitutional provisions other than the Export Clause," *id.* at 368, the *Massachusetts* framework determines whether an assessment constitutes a valid user fee.

Petitioner claims (Pet. 11, 13-18) that, if a charge when applied to exports is a "tax" prohibited by the Export Clause rather than a bona fide user fee, the same charge when applied to domestic shipments is necessarily a "duty" subject to the Uniformity Clause rather than a permissible user fee. That is incorrect. This Court has "consistently recognized that the interests protected by [constitutional provisions limiting the taxing power] are not offended by revenue measures that operate only to compensate a government for benefits supplied." *Massachusetts*, 435 U.S. at 462. And the Court made clear in *United States Shoe* that, when Congress intends for an assessment to constitute a user fee, there must be a closer relationship between the charge and the service supplied to satisfy the strict test that applies under the Export Clause than under the more flexible *Massachusetts* test that controls when applying other constitutional provisions. See 523 U.S. at 367-369; *id.* at 368 ("Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority.").

The Court's opinion in *United States* v. *IBM*, 517 U.S. 843, 857 (1996), is instructive. Petitioner's argument here (Pet. 14-15) is that the term "tax" in the Export Clause is broader than (and inclusive of) the terms "duty," "impost," and "excise" in the Uniformity Clause. In *IBM*, this Court rejected an analogous

argument concerning the relationship between the term "tax" in the Export Clause and the terms "duty" and "impost" in the Import-Export Clause, U.S. Const. Art. I, § 10, Cl. 2. The Court explained that its decisions have "left open the possibility that a particular state assessment might not properly be called an impost or duty, and thus would be beyond the reach of the Import-Export Clause, while an identical federal assessment might properly be called a tax and would be subject to the Export Clause." 517 U.S. at 857.[4]

c. According to petitioner (Pet. 18-23), the court of appeals' holding that the HMT as applied to domestic shipping is a valid user fee under the Uniformity Clause will have substantial adverse implications for administration of the federal budgeting process and the legislative process related to enactment of federal revenue laws. That argument is baseless.

The allegedly adverse consequences identified by petitioner—such as the purported implications for

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[4] Petitioner also errs in claiming (Pet. 16-17) that the Export Clause and Uniformity Clause reach the same category of assessments because the two clauses share a "common function and history." Petitioner relies (Pet. 17) on language in this Court's decision in *IBM* explaining that, "[a]s a purely historical matter the Export Clause was originally proposed by delegates to the Federal Convention from the Southern States, who feared that the Northern States would control Congress and would use taxes and duties on exports to raise a disproportionate share of federal revenues from the South." 517 U.S. at 859. The Court later explained, however, that "[w]hile the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language." *Id.* at 859-860. The close scrutiny that this Court applies when assessing whether a particular charge is a bona fide user fee in the context of the Export Clause reflects the unique breadth of that Clause. *United States Shoe*, 523 U.S. at 368-369.

federal deficit accounting, for the extent to which imposition of the assessment can be delegated to an agency, and for the proper legislative procedures for raising and enacting the revenue laws—are consequences that chiefly would be felt in (and could be rectified by) Congress. And Congress, as explained, intended for the HMT to be a user fee, not a general revenue-raising tax. See p. 7, *supra*. Moreover, insofar as petitioner means to suggest (Pet. 18) that those consequences are magnified if the HMT is treated as a tax for purposes of the Export Clause but a user fee for purposes of the Uniformity Clause, the short answer is that Congress specifically made the HMT subject to a severability clause, under which Congress made clear its intention that the invalidation of certain applications of the HMT would not affect the remaining applications. See 33 U.S.C. 2304. The court of appeals, relying on prior decisions, thus held that HMT's invalid application to exports should be severed from its remaining applications, including to domestic shipping. Pet. App. 6a-8a; see *Carnival Cruise Lines, Inc.* v. *United States*, 200 F.3d 1361, 1369 (Fed. Cir.), cert. denied, 530 U.S. 1274 (2000). Petitioner raises no challenge to that aspect of the court of appeals' decision.

d. In any event, even if the HMT, as applied to domestic shipping, constituted a tax subject to the Uniformity Clause, the result below would not change. As the Court of International Trade correctly concluded, the HMT's application to domestic shipping does not violate the Uniformity Clause's requirements. Pet. App. 22a-23a.

"The Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems." *United States* v. *Ptasynski*, 462 U.S. 74, 84 (1983). The Clause

was intended to prevent "the national government [from] us[ing] its power over commerce to the disadvantage of *particular States*." *Id.* at 81 (emphasis added). In a case involving assessments at ports, the prohibition of the Uniformity Clause against discrimination in favor of (or against) particular States mirrors the prohibitions of the Port Preference Clause. See *Knowlton* v. *Moore*, 178 U.S. 41, 106 (1900) ("[T]he preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception."). See also *Ptasynski*, 462 U.S. at 81 n.10. Accordingly, the HMT as applied to domestic shipping is valid under the Uniformity Clause for the same reasons that it is valid under the Port Preference Clause. See pp. 13-17, *infra*. Indeed, the Court's rejection in *Ptasynski* of a Uniformity Clause challenge to an exemption for certain Alaskan oil from the coverage of a general tax on crude oil should foreclose petitioner's challenge to a comparable exemption under the HMT for domestic cargo shipments to and from Alaska, Hawaii, and United States territories. See pp. 15-16, *infra*.

2. Petitioner argues (Pet. 26-29) that the HMT's provisions, as applied to domestic shipments, entail an invalid preference for the ports of certain States in violation of the Port Preference Clause. The court of appeals correctly rejected that claim.

The Port Preference Clause provides that "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U.S. Const. Art. I, § 9, Cl. 6. The Clause "has never been relied upon by the federal judiciary to hold an act of Congress unconstitutional." *Kansas* v. *United States*, 16 F.3d 436, 439 (D.C. Cir.), cert. denied, 513

U.S. 945 (1994). As this Court has established, "what is forbidden" by the Clause is "not discrimination between individual ports within the same or different States, but discrimination *between States*." *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1855) (emphasis added). The Court has also made clear that the Clause imposes no bar against a facially non-discriminatory law that has incidental, disparate effects on ports of one or more states. See, *e.g.*, *id.* at 433-436; *Armour Packing Co.* v. *United States*, 209 U.S. 56, 80 (1908); *Louisiana Pub. Serv. Comm'n* v. *Texas & New Orleans R.R.*, 284 U.S. 125, 131 (1931).

Petitioner argues (Pet. 27-29) that the HMT, as applied to domestic shipping, violates the Port Preference Clause because of the HMT's exemption for domestic shipments between the continental United States and Alaska, Hawaii, and United States territories. See 26 U.S.C. 4462(b). That exemption does not violate the Port Preference Clause. There is no indication that the exemption was intended as an illicit preference for the States of Alaska and Hawaii (and United States territories) over other States. To the contrary, "Congress crafted a narrow exemption to alleviate a disproportionate incidence of the tax on Alaska and Hawaii as a result of their heavy reliance on domestic shipping," due to their "vast geographical separation" from the continental United States. Pet. App. 18a. Alaska and Hawaii thus enjoy no exemption from the HMT with respect to *international* shipments passing through their ports. See 26 U.S.C. 4462(b)(1). Moreover, the fact that the exemption encompasses United States possessions as well as Alaska and Hawaii confirms that it is grounded in concerns about the burdens of geographic separation rather than an invalid preference for the ports of specific States.

Indeed, the exemption applies not just to ports in Alaska and Hawaii when receiving shipments from the continental United States, but also to ports in *any* State when receiving shipments from Alaska and Hawaii. 26 U.S.C. 4462(b)(1)(A)-(C). Because all ports in all States are exempt from the HMT with respect to the unloading of domestic cargo (other than Alaskan crude oil) shipped to or from Alaska and Hawaii, the exemption is not in fact one for the ports of Alaska and Hawaii alone, but is one for a certain class of merchandise, wherever the associated port use occurs. That the exemption may incidentally benefit the ports of certain States (Alaska, Hawaii, and other States where domestic consumables subject to the exemption are unloaded) does not infringe the Port Preference Clause. See *Armour*, 209 U.S. at 80; *Louisiana Pub. Serv. Comm'n*, 284 U.S. at 131. In short, it "is clear that the intent and effect of the exemption was not to provide a preference for the ports of the exempted states at the expense of the ports of other states, but rather to provide some relief from the disparate effects the HMT would have had on the shipping-dependent states and possessions." Pet. App. 17a-18a.

That analysis is supported by this Court's decision in *Ptasynski*, 462 U.S. at 74. There, the Court upheld under the Uniformity Clause a provision exempting certain oil produced in Alaska from the coverage of a general tax on crude oil. The Court explained that the Clause does not "prohibit all geographically defined classifications" and "does not prohibit [Congress] from considering geographically isolated problems." *Id.* at 84. The Court upheld the exemption for certain oil produced in Alaska because of "the disproportionate costs and difficulties * * * associated with extracting oil from this region." *Id.* at 85. The Court explained

that "[n]othing in the Act's legislative history suggests that Congress intended to grant Alaska an undue preference at the expense of other oil-producing States." *Id.* at 86. In this case, likewise, the HMT's exemption for domestic shipments to and from Alaska and Hawaii addresses "geographically isolated problems" (*id.* at 84) rather than manifesting an "undue preference at the expense of other" States (*id.* at 86). See *City of Houston* v. *FAA*, 679 F.2d 1184, 1197 (5th Cir. 1982) ("Government actions do not violate the [Port Preference] Clause even if they result in some detriment to the port of a state, where they occur * * * more as a result of the accident of geography than from an intentional government preference.").

The domestic cargo exemption related to Alaska and Hawaii (and United States territories) thus is a far cry from the "paradigm evil the [Port Preference] Clause was explicitly designed to prevent"—"a federal law requiring ships sailing to Baltimore to first enter and clear at Norfolk." *Kansas* v. *United States*, 16 F.3d at 439; see *United States* v. *Lopez*, 514 U.S. 549, 587 (1995) (Thomas, J., concurring) ("Although it is possible to conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the [Port Preference] Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports."). In view of the geographic isolation of Alaska and Hawaii, it is "difficult to imagine domestic shippers deliberately routing cargo to a port in Alaska or Hawaii as an intermediate stop * * * in order to avoid HMT liability." Pet. App. 19a. It therefore "is hard to view this exemption as one that will channel commerce through the ports of one state to the detriment of the ports in other states." *Ibid.*

The court of appeals' careful analysis of whether the domestic cargo exemption for Alaska, Hawaii, and United States possessions constitutes an illicit preference for certain states belies petitioner's contention that the court's analysis "gut[s] the protections of the Port Preference Clause." Pet. 27. Petitioner asserts (*ibid.*) that Congress would rarely "leave evidence that it distinguished between states for the nefarious purpose of 'favoring' some states at the expense of others." But the court of appeals carefully examined the purpose of the exemption and its operative effect before concluding that "the intent and effect of the exemption was not to provide a preference to the ports of * * * Alaska and Hawaii at the expense of the ports of other states." Pet. App. 19a; cf. *Ptasynski*, 462 U.S. at 85 ("[W]here Congress * * * choose[s] to frame a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination."). There is no warrant for granting review of that holding.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 03-867

IN THE
# Supreme Court of the United States

CF INDUSTRIES, INC.,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The Federal Circuit**

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## RULE 29.6 DISCLOSURE

Petitioner CF Industries, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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Petitioner CF Industries Inc., respectfully submits this reply to the government's brief in opposition to the petition for writ of certiorari in this case.

## ARGUMENT

### A. The Court of Appeals' Decision Under the Uniformity Clause Conflicts With the Premise of This Court's Decision in *United States Shoe*

The government asserts that the court of appeals was free to decide that the HMT is a user fee and not a tax, notwithstanding this Court's contrary decision, in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), that the HMT is a tax and not a user fee. (Opp. at 9-11.) The government's assertion does not withstand scrutiny. The question whether the HMT is a tax or a user fee turns upon the relationship between the monetary assessment, on the one hand, and the government services that the assessment would fund, on the other. (Pet. at 9.) The government implicitly concedes, through its silence, that the assessment, the government service, and the relation between the two are the same in this case as in *United States Shoe*. (*See id.* at 9-10.) The holding of *United States Shoe* therefore controls this case and foreclosed the court of appeals from holding that the HMT is a user fee and not a tax. The Court should grant review where, as here, a court of appeals issues a decision that flouts a ruling of this Court.

1. The government attempts to reconcile the court of appeals' decision with *United States Shoe*, by asserting that *United States Shoe* adopted a definition of "tax" unique to the Export Clause context. (Opp. at 9-10.) The government's citations to the *United States Shoe* opinion do not prove its point. *First*, the government cites language from *United States Shoe* indicating that the Export Clause is a stricter *limitation* on the taxing power than other limitations on that power. (*Id.* at 9.) Yet the definition of

what constitutes a tax does not change in different provisions of Article I simply because such limitations may differ from provision to provision. (*See* Pet. at 11.) *Second*, the government does not prove its point by noting *United States Shoe*'s reliance on an Export Clause precedent (*Pace v. Burgess*, 92 U.S. 372 (1875)). (Opp. at 9.) The government does not even respond to CF Industries' explanation that the Court relied on *Pace* because the other precedents that the Court distinguished did not address the specific textual question presented – namely the difference between an Article I "tax" or "duty" and a user fee. (*Compare* Opp. at 9 *with* Pet. at 11-12.)[1]

2. By asserting that the court of appeals properly limited *United States Shoe* to the Export Clause context, the government tacitly confirms that the court of appeals gave the terms "tax" and "duty" different meanings under the Export Clause than under other provisions of Article I. As the petition demonstrates, the logic of the court of appeals' decision is that the terms indirect "tax" and "duty" mean something different under the Export Clause than under the Uniformity Clause (and related provisions). (Pet. 13-15.) That is because (as the government does not dispute) *United States Shoe* concluded that the HMT *is* an indirect "tax" or "duty," whereas the court of appeals concluded that the HMT is *not* an indirect "tax" or "duty." (*Id.*) The government's sole response to this crucial point is a cryptic citation to *United States v. IBM Corp.*, 517 U.S. 843 (1996). (Opp. at 10.) *IBM* is wholly consistent with CF Industries'

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[1] The government also is wrong when it asserts that the HMT meets the test for a user fee set out in *Massachusetts v. United States*, 435 U.S. 444 (1978). (Opp. at 8-9.) Among other things, the HMT assessment is not based on a fair approximation of use, given that there is "little relationship" between the *ad valorem* assessment and the harbor maintenance services it funds. (Pet. at 19 (citing 131 Cong. Rec. H9737 (daily ed. Nov. 6, 1985)).)

analysis, which demonstrates that there are only two types of Article I "taxes" (direct and indirect); that every indirect "tax" is either a "duty," "impost," or "excise"; and that this Court has always interpreted those terms the same way in different provisions of Article I. (Pet. at 13-14.) *IBM* simply holds that under Article I there are some "taxes" – such as direct "taxes" – that are neither "duties" nor "imposts." *See* 517 U.S. at 857-58 & n.6 (referring to direct taxes on capitation and property as examples of assessments that are taxes but not imposts or duties). In making that point, the *IBM* court interpreted the term "duty" the same way under the Export Clause and the Import-Export Clause. (Pet. at 16.) *IBM* therefore supports the conclusion that this Court has interpreted the terms of Article I the same way wherever they appear, contrary to the court of appeals' decision.

3. The government attempts to minimize the significance of the court of appeals' decision, even though the decision has binding effect nationwide because of the court of appeals' exclusive jurisdiction over matters involving revenues raised at the ports. The government does not deny that the court of appeals' decision would substantially undermine the coherence of the taxation regime that the Founders designed under Article I (Pet. at 17-18); that the federal budget process would be disrupted if taxes could be characterized also as user fees (*id.* at 18-21); or that the legislative process would be disrupted if the same assessment could be characterized both as a tax and as a user fee (*id.* at 21-23). The government simply asserts that these "are consequences that chiefly would be felt in (and could be rectified by) Congress." (Opp. at 12.) Undermining the integrity of the Article I taxation regime plainly creates deleterious effects to the constitutional scheme well beyond the halls of Congress. And the consequences of the court of appeals' ruling would not be diminished even if they would be chiefly felt in that coordinate branch of government. Furthermore, a number of the consequences (*e.g.*, whether

the power to impose an assessment may be delegated to an administrative agency and whether the House of Representatives must initiate the measure raising the assessment) could not be avoided by Congress, because they derive from the structure of government imposed by the Constitution. Finally, it is no answer to these problems for the government to assert that Congress intended the HMT to be a user fee. (*Id.* at 7, 12.) That assertion is refuted by the fact that the HMT is denominated a "tax" and codified in the Internal Revenue Code, and by the congressional committees' awareness that an *ad valorem* assessment has too remote a connection to harbor use to be properly viewed as a user fee. (*See* Pet. at 19-20.) In any event, as the government necessarily concedes (Opp. at 7 n.3), Congress's intent does not control the constitutional question whether the HMT is an indirect "tax" or "duty" within the meaning of Article I.

### B. The Court's Review Should Address the Substantive Scope of the Uniformity Clause

The government does not deny that the court of appeals' decision left intact a significant, nationally binding interpretation of the Uniformity Clause affecting more than 1,000 other cases and approximately $1 billion in taxes. The government also does not dispute that this Court should address the merits of the Uniformity Clause issue if it grants review. In discussing the Uniformity Clause, the government relies solely on a merits argument that does not square with this Court's Uniformity Clause decisions.

1. The HMT violates the Uniformity Clause because the subject of the tax – "port use" defined as cargo unloadings – is taxed differently in Alaska and Hawaii than in the other coastal ports. (*See* Pet. at 3-5, 24-25.) The government responds by asserting that the same subject may be taxed differently in different areas of the country, as long

as Congress does not intend to disadvantage particular unfavored states. (Opp. at 13-14.) That assertion directly contradicts the longstanding Uniformity Clause jurisprudence requiring that a tax must operate "with the same force and effect in every place where the subject of it is found." *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 594 (1884); *see also United States v. Ptasynski*, 462 U.S. 74, 82 (1983) (once Congress has defined the class to be taxed, the tax must "apply wherever the classification is found."). Furthermore, the government's argument gains no support from this Court's statement that "'[t]he Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems.'" (Opp. at 12 (citing *Ptasynski*, 462 U.S. at 84).) When read in context, the cited passage means only that Congress need not confine its taxes to subjects that exist throughout the entire country, and may properly tax a subject that exists only within particular geographic areas, *as long as the tax treats that subject the same way throughout those particular areas.*[2]

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[2] This meaning is plain from the two precedents that the Court cited in *Ptasynski* to support its statement concerning "geographically isolated problems." The first citation is to the *Head Money Cases*, which held that Congress could properly impose an immigration tax in a specific geographic area – the coastal ports – because the subject of the tax only existed within that area, and the tax was imposed uniformly within that area. *Ptasynski*, 462 U.S. at 84 (citing the *Head Money Cases*, 112 U.S. at 595). *Ptasynski's* second citation regarding "geographically isolated problems" is to the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), which affirmed the constitutionality of a railroad reorganization statute that applied in only two regions of the country. *Ptasynski*, 462 U.S. at 84-85 (citing the *Regional Rail Reorganization Act Cases*, 419 U.S. at 156-161). The *Regional Rail Reorganization Act Cases* held that the statute complied with constitutional uniformity requirements because no railroad reorganizations existed outside of those two regions during the life of the statute; the statute therefore treated the subject of the legislation – railroad reorganizations – the same way

*(footnote continued on next page)*

2. In addition, the government's assertion that *Ptasynski* forecloses CF Industries' challenge to the HMT (Opp. at 13) has no basis. The government's interpretation of *Ptasynski* is wrong, because it conflicts with the fundamental premise of the Court's decision: the longstanding rule that an indirect tax must operate "'with the same force and effect in every place where the subject of it is found.'" *Ptasynski*, 462 U.S. at 82 (quoting the *Head Money Cases*, 112 U.S. at 594). *Ptasynski* repeatedly invoked that rule. *See id.* at 82 (the Framers "intended only that the tax apply wherever the classification is found"); *id.* at 84 ("As construed in the *Head Money Cases*, the Uniformity Clause requires that an excise tax apply, at the same rate, in all portions of the United States where the subject of the tax is found."). When it applied the rule in *Ptasynski*, the Court held that the windfall profits tax at issue complied with the Uniformity Clause, by treating windfall profits the same way wherever they occurred. Although the statute exempted specific isolated regions of Alaska from the tax, no windfall profits would be generated in those regions, and windfall profits therefore were taxed the same way wherever they actually did exist. Application of the same rule in the present case requires reversing the court of appeals' judgment, because certain "port use" is not taxed in Alaska and Hawaii but is taxed in the other coastal states where such "port use" occurs.

3. The government's effort to merge its analysis of the

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*(footnote continued from previous page)*

wherever they actually occurred. It is significant here that the *Regional Rail Reorganization Act Cases* characterized Congress's power to address regional concerns through such a geographically neutral statute as the authority to address "geographically isolated problems." *Regional Rail Reorganization Act Cases*, 419 U.S. at 159. The Court used the same phrase to refer to the same concept in *Ptasynski*.

Uniformity Clause with its analysis of the Port Preference Clause (Opp. at 13) also does not withstand scrutiny. The tests for unconstitutional assessments are entirely different under the two Clauses. Under the Uniformity Clause, a tax statute is unconstitutional if it does not treat the same subject the same way in all geographic areas of the country. *See supra*. Under the Port Preference Clause, a tax statute is unconstitutional if it grants an express preference to all of the ports of a state. (Pet. at 26.)

### C. The Court Should Grant the Petition to Address the Question Whether the Port Preference Clause Remains a Meaningful Limit on Congressional Power

The Court also should grant the petition to address the question whether the Port Preference Clause remains a meaningful limit on congressional power.

1. The government confirms that this Court's Port Preference Clause decisions establish two elements for an unconstitutional preference: (1) it must be expressly granted by statute; and (2) it must favor all of the ports of a state. (Opp. at 14.) However, the government also agrees with the court of appeals that there is an additional third element – the preference must derive from "illicit" favoritism for one state over another. (*Id.*) That third element does not appear anywhere in this Court's Port Preference Clause decisions.[3] As a result, the government seeks to graft the third element

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[3] The government cites a passing reference to the Port Preference Clause in Justice Thomas's concurring opinion in *United States v. Lopez*, 514 U.S. 549, 587 (1995), which is focused on the meaning of the Commerce Clause and the term "commerce" as it appears in the Port Preference Clause. (*See* Opp. at 16.) That concurring opinion did not purport to construe the meaning of a "preference" under the Port Preference Clause.

onto the Port Preference Clause from this Court's Uniformity Clause decision in *Ptasynski* (*see* Opp. at 15-16) and from lower court opinions (*see id.* at 16). The government misconstrues these decisions.[4] Furthermore, the question whether the government is correct in its extrapolation from these other sources of law is a question of substantial national importance warranting this Court's review, because the interpretation proffered by the government and the court of appeals would eviscerate the protections of the Port Preference Clause. (Pet. at 26-29.) The court of appeals has exclusive intermediate-level appellate jurisdiction over cases involving the revenue laws at the ports, and denying review would allow the court of appeals' limiting interpretation of the Port Preference Clause to stand as binding precedent nationwide. The Court should grant review to delineate the scope of the constitutional protections in this important area.

2. The government's merits arguments do not detract from the case for Supreme Court review. The government has absolutely no basis for asserting that the preference for the ports of Alaska and Hawaii is merely "incidental[ ]."

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[4] *Ptasynski* did not turn on favoritism for one state over another and instead reiterated that a tax is unconstitutional simply because it treats the same subject differently in different geographic areas. *Supra* at 5-6. The two lower court opinions cited by the government also do not support its argument. *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982) states (correctly) that a preference must be expressly stated in a statute to be unconstitutional. The government also grossly misconstrues a passage in *Kansas v. United States*, 16 F.3d 436 (D.C. Cir. 1994) indicating that the Port Preference Clause was designed to preclude Congress from requiring ships sailing to one state from entering and clearing at another state. (*See* Opp. at 16.) The Port Preference Clause is divided into two subclauses – the first precludes Congress from granting port preferences, and the second precludes "Vessels bound to, or from, one State" from being "obliged to enter, clear, or pay Duties in another." U.S. CONST. art. I, § 9, cl. 6. The cited passage from *Kansas* obviously refers to the second subclause, even though only the first subclause is relevant here.

(Opp. at 15.) The HMT statute grants an express exemption, in stark contrast to the statutes that this Court has upheld under the Port Preference Clause, which have been geographically neutral on their face even if they have generated incidental disparate effects on the ports of a state. (*See id.* at 14.) Furthermore, the government concedes that in the HMT statute, Congress specifically intended to benefit Alaska and Hawaii (but not any of the other coastal states) through the HMT exemption. (*Id.*)

3. In addition, contrary to the government's assertions (*id.* at 15), the HMT statute does favor all of the ports of two states (Alaska and Hawaii). The government does not, and cannot, dispute that cargo unloadings are tax-exempt in Alaska and Hawaii, but not in any of the other coastal states, if they are either (1) unloadings of cargo from intrastate shipments or (2) unloadings of cargo shipped from any of the "lower 48" states. (Pet. at 4-5.) The government instead tries to change the subject to a third category of shipments: cargo shipped *to* any state *from* Alaska or Hawaii. (Opp. at 15.) The government then tries to blur the distinction between the three categories of shipments described above by claiming that the statute exempts a single type of merchandise that is treated the same way everywhere. (*Id.*) The government's analysis conflicts with the structure of the HMT statute, which confirms the distinctness of the three categories of shipments by assigning each to a different subsection. *See* 26 U.S.C. § 4462(b)(1)(A)-(D).[5] The Court should grant review because two of these subsections (*i.e.*,

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[5] Furthermore, even if the three categories were considered together, the HMT statute plainly treats "port use" preferentially in Alaska and Hawaii compared to the other coastal states. In Alaska and Hawaii, unloadings of cargo from domestic sources are always tax-exempt, whereas in all of the other coastal states, unloadings of cargo from domestic sources are always taxed, unless the cargo comes from Alaska or Hawaii.

those regarding intrastate shipments and shipments from the "lower 48" states) grant an express preference for all of the ports of Alaska and Hawaii.

## CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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Nos. 03-867 and 03-882

# *In the Supreme Court of the United States*

CF INDUSTRIES, INC., *Petitioner v.* UNITED STATES OF AMERICA, *Respondent*

AND

THOMSON INC., F/K/A THOMSON MULTIMEDIA INC., *Petitioner, v.* UNITED STATES OF AMERICA, *Respondent.*

*On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit*

## BRIEF OF *AMICI CURIAE* HITACHI HIGH TECHNOLOGIES AMERICA, INC., THE MARKETING STORE WORLDWIDE, L.P., AND TEAC AMERICA, INC. IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST[1]

Hitachi High Technologies America, Inc., The Marketing Store Worldwide, L.P., and TEAC America, Inc., *amici curiae* in this appeal, respectfully submit this brief in support of CF Industries, Inc. and Thomson Inc. Both petitioners and the respondent have consented in writing to the filing of this brief.

Hitachi High Technologies America, Inc. of Schaumburg, Illinois, is an importer of semiconductor manufacturing equipment, analytical instrumentation, scientific instruments, bio-related products, industrial equipment, information equipment, electronic devices, and electronic and industrial materials.

The Marketing Store Worldwide, L.P. of Oakbrook Terrace, Illinois, is a large volume importer that provides promotion and marketing services to multinational corporations.

Finally, TEAC America, Inc. of Montebello, California, an importer of advanced recording equipment, is the largest subsidiary of Tokyo-based TEAC Corporation, a billion-dollar global corporation and a world leader in recording technology for over four decades.

As significant U.S. importers who have paid several million dollars in Harbor Maintenance Taxes ("HMT"), *amici curiae* have an interest in the outcome of this appeal. *Amici curiae* agree with petitioners that the unconstitutional

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[1] Pursuant to S. Ct. Rule 37.6, *amici curiae* state that no counsel for any party to this case authored this brief in whole or in part and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

HMT's export provisions are not severable from the statute's import provisions.

## STATEMENT OF THE CASE

*Amici curiae* adopt the Statement of the Case contained in CF Industries, Inc.'s and Thomson Inc.'s Petitions for *Writs of Certiorari*.

## SUMMARY OF ARGUMENT

A long-standing canon of statutory construction known as the *Charming Betsy* doctrine provides that an interpretation of a statute which violates the United States' international obligations is to be avoided. In this instance, there is little dispute that the HMT (26 U.S.C. § 4461), in its current form, violates the United States' commitments under the General Agreement on Tariffs and Trade 1947 ("GATT"). Given this prohibition, in order for the Court to uphold the HMT, it must determine that Congress expressed a clear intent to enact the HMT knowing the statute would conflict with the United States' international obligations.

Review of the legislative history to the HMT shows that there is no clear expression of Congress' intent to enact a GATT-inconsistent statute. The Court should therefore presume, based on the *Charming Betsy* doctrine, that Congress would not have enacted the HMT had it known that the statute would violate U.S. GATT obligations. The HMT's export provisions are therefore not severable from the statute's import provisions.[2]

---

[2] Although *amici* address just Question 1 presented in Thomson Inc.'s petition for a *writ of certiorari*, we agree with both petitioners that the HMT is a "tax" and not a user fee and therefore unconstitutional under the Uniformity and Port Preference Clauses of the U.S. Constitution. *See* Thomson Pet. at 16-30; CF Indus. Pet. at 8-29.

## ARGUMENT

### I. THE "CHARMING BETSY" DOCTRINE PROVIDES THAT AN INTERPRETATION AND APPLICATION OF A STATUTE WHICH WOULD RESULT IN A VIOLATION OF THE UNITED STATES' INTERNATIONAL OBLIGATIONS IS TO BE AVOIDED.

From nearly its inception, this Court has recognized that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently can never be construed to violate . . . rights . . . further than is warranted by the law of nations as understood in this country." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). Otherwise known as the *Charming Betsy* doctrine, this principle of statutory interpretation serves as the basis for the presumption that "Congress does not intend to repudiate an international obligation of the United States . . . by nullifying . . . an international agreement . . . or making it impossible for the United States to carry out is obligations." Restatement (Third) Foreign Relations Law of the United States, at 64 (1987) (emphasis added).

As discussed in detail in Petitioner Thomson Inc.'s Petition for *Writ of Certiorari*, a primary issue before this Court is "[w]hether the export provisions of the HMT, which this Court held unconstitutional in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), are not severable from the statute's import provisions, which Congress enacted together with the export provisions as part of a legislative compromise." Importantly, "whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526

U.S. 172, 191 (1999) (emphasis added) citing *Regan v. Time Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion).

As this Court has recognized, "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress. . . . The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (italics original; underscoring added). The sole question before this Court on the issue of severability is, therefore, whether, in the context of the *Charming Betsy* doctrine, the HMT statute created in the absence of the export provisions is legislation that Congress would not have enacted. Because there is no clear expression of Congressional intent to enact a GATT-inconsistent HMT statute, the *Charming Betsy* doctrine counsels the Court to conclude that the unconstitutional provisions are not severable.

## II. AS A TAX ON IMPORTS, THE HMT VIOLATES THE UNITED STATES' COMMITMENTS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE (1947).

Although the U.S. Court of Appeals for the Federal Circuit held that the HMT was a "user fee," this Court has held that "Congress expressly describe [the HMT] as 'a *tax* on any port use.'" *United States Shoe*, 523 U.S. at 367 (emphasis added) (quoting 26 U.S.C. § 4461(a)). In addition, in enacting the HMT, Congress consistently referred to, and thereby recognized, the HMT as a "tax."

For example, the Senate Environment & Public Works Committee Report states that the Senate version of the Water Resources Development Act (the legislative vehicle for the HMT) assessed a "cargo tax:"

> The bill sets this cargo tax on the value of the commercial cargo loaded or unloaded. The tax in Title 8 is not on the harbor, nor is it on the vessel's operator or owner. The tax is set on the value of the cargo, and it is to be paid by the owner of the cargo, or his agent.

S. Rep. 99-126, at 9 (1985).

Similarly, the House Conference Report also refers to imposition of a "port use tax:"

> Imposition of tax. -- The House bill imposes an excise tax on the use of a U.S. harbor or channel ("port") by a commercial vessel for loading or unloading of commercial cargo.
>
> Applicability of tax. -- The port use tax does not apply with respect to:
>
> * * *
>
> Payment of tax. -- The tax is payable by the . . . importer . . . . The tax is imposed only once with respect to transportation of any cargo on the same vessel.
>
> Administration of tax. -- The port use tax is to be administered and enforced by the

> U.S. Customs Service in a manner similar to customs duties.

H. Conf. Rep. 99-1013, at 228-230 (1986); *See*, S. Rep. 99-126 at 9-10, 129, 131, 133, 135 (1986) (describing HMT as tax); H.R. Rep. 99-228, at 228-31 (1986); H.R. Rep. 99-251, at 1-4, 7-14 (1985); S. Rep. 99-126, at 2-4, 9-10, 115, 129, 133 (1985).

GATT Article VIII:1(a) specifically provides that "fees and charges . . . shall not represent . . . a taxation on imports." In addition, although GATT Article II:2(c) permits the assessment on imports of "fees or other charges," such fees or charges must be "commensurate with the cost of services rendered." This Court has recognized, however, that "Congress expressly described [the HMT] as 'a *tax* on any port use . . . ." *United States Shoe*, 523 U.S. at 367 (emphasis added) (quoting 26 U.S.C. § 4461(a)). In addition, this Court held that "the tax . . . is not a fair approximation of services, facilities, or benefits furnished to the exporters, and therefore does not qualify as a permissible user fee." *United States Shoe*, 523 U.S. at 363.

Furthermore, several countries, led by the European Union, have requested GATT consultations with the United States to discuss the United States' HMT-related violation of GATT Articles I, II, III, VIII, and X. *See* Request for Consultations, *United States-Harbor Maintenance Tax*, DS118 (W.T.O. Feb. 6, 1998) and European Comm'n, *Report on United States Barriers to Trade and Investment – 2002* (Nov. 2002). In addition, subsequent to this Court's ruling in *United States Shoe*, the Clinton administration transmitted to Congress a proposal to replace the HMT with a Harbor Services Fee. *See Hearing on the Admin.'s Harbor Service Fee Proposal and Harbor Services Fund Proposal Before the House Subcomm. on Water Resources & Envn't,*

*of the Committee on Transportation and Infrastructure*, 106th Cong. 44 (1999) (statement of Dr. Joseph W. Westphal, Asst. Sec. of the Army (Civil Works)) (acknowledging that, after this Court's decision in *United States Shoe*, "GATT has a serious problem with [the HMT] . . . [which] is now only being applied to imports."). Accordingly, the HMT as a tax on imports, subsequent to this Court's holding that the HMT was unconstitutional as applied to exports, violates the United States' GATT commitments.

## III. THERE IS NO CLEAR EXPRESSION OF CONGRESS' INTENT TO ENACT A GATT-INCONSISTENT HMT. THE COURT SHOULD THEREFORE PRESUME THAT CONGRESS WOULD NOT HAVE ENACTED THE HMT IN VIOLATION OF THE UNITED STATES' GATT OBLIGATIONS AND, THEREBY, HOLD THAT THE HMT ON EXPORTS IS NOT SEVERABLE.

As discussed above, the sole question before the Court on the issue of severability is whether the HMT statute created in the absence of the HMT on exports is legislation that Congress would not have enacted. In answering this question, it is essential to first recognize that "some affirmative expression of congressional intent to abrogate the United States' international obligations is required . . . ." *Weinberger v. Rossi*, 56 U.S. 25, 32 (1982). "What is essential is clear evidence that Congress actually . . . intended action on the one hand and [] treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 739-740 (1986). *See also*, *Fundicao Tupy S.A. v. United States*, 652 F. Supp. 1538, 1543 (Ct. Int'l Trade 1987) ("An interpretation and application of the statute which would

conflict with the GATT Codes would clearly violate the intent of Congress."); *Federal Mogul Corp. v. United* States, 63 F.3d 1572, 1581 (Fed. Cir. 1995) ("GATT Agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations.") (emphasis added).[3]

Upon review of the legislative history to the HMT, there is no clear expression by Congress that it would have implemented the HMT statute knowing that the statute would conflict with the United States' GATT obligations. Rather, the legislative history indicates that Congress enacted the HMT statute in its original form to specifically avoid a conflict with GATT obligations.

For example, a report issued by the House Merchant Marine and Fisheries Committee recognized a possible conflict with the United States' GATT commitments by noting that "if the proposed levy is construed to be a revenue-raising measure, there is the possibility of either a GATT claim or the threat of retaliation by individual trading partners." H.R. Rep. No. 99-251 (1985). In addition, a witness testifying before the House Ways and Means Committee stated that "imposing [the HMT] only on imports would present significant GATT problems, and for that reason alone it was decided to impose the [HMT] on both exports and imports and on movement on the inland waterways." *Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985*: Hearing

[3] It is important to recognize that a successful challenge of the HMT under the GATT could result in the assessment of "retaliatory" duties on U.S. origin products, which would severely weaken the international competitiveness of U.S. exporters.

Before the House Committee on Ways and Means on H.R. 6, 99th Cong. 31, at 37 (1985).

In contrast, the U.S. Court of International Trade believes "the issue is not whether an HMT on imports alone violates the GATT, but whether Congress was so fearful of negative GATT implications that it would not have enacted the HMT on imports without the HMT on exports." *Amoco Oil Company v. United States*, 63 F. Supp. 2d 1332, 1337 (Ct. Int'l Trade 1999). As the basis for this decision, the Court of International Trade correctly recognized that Congress possesses the authority to pass laws which conflict with the United States' international obligations. *Id.* However, what the Court failed to recognize is that the *Charming Betsy* doctrine provides that "an act of Congress ought never to be construed to violate the law of nations" and, therefore, "absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations." *Federal Mogul Corp. v. United* States, 63 F.3d 1572, 1581.

The test to be applied is, therefore, not whether Congress was "fearful of negative GATT implications." Rather, the test is whether the HMT on imports conflicts with the United States' international obligations and, if so, whether there was a clear expression of Congressional intent to enact the HMT on imports with the knowledge that the statute would conflict with these international obligations.

As established above, the HMT on imports does, in fact, conflict with the United States' international obligations. In addition, there is no clear expression by Congress of its intent to enact the HMT on imports with the knowledge that the statute would conflict with the United States' international obligations. Indeed, as the legislative history discussed above indicates, Congress carefully crafted the

HMT to *avoid* any conflict with GATT, by making it applicable to exports and imports alike. The HMT on exports is, therefore, not severable. Accordingly, the Court should hold that the U.S. Court of Appeals for the Federal Circuit's decision on severability, which relied heavily on the Court of International Trade's decision in *Amoco Oil Company*, was in error. *See Thomson Multimedia Inc. v. United States*, 340 F.3d 1355 (Fed. Cir. 2003).

## CONCLUSION

For the reasons stated above, *amici curiae* Hitachi High Technologies America, Inc., The Marketing Store Worldwide, L.P., and TEAC America, Inc. respectfully request that the petition of CF Industries, Inc. and Thomson Inc. be granted.

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IN THE

# Supreme Court of the United States

CF INDUSTRIES, INC.,

*Petitioner*,

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

THOMSON INC.,

*Petitioner*,

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

## BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS IN SUPPORT OF THE PETITIONERS

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## INTEREST OF AMICUS CURIAE

This brief is filed by the American Association of Exporters and Importers ("AAEI") as amicus curiae in support of the petitions for writs of certiorari filed by Thomson Inc. and CF Industries, Inc.[1]

Founded in 1921, AAEI is a national association of over 1,000 U.S. firms that export, import, distribute, and manufacture a broad range of products, including chemicals, electronics, machinery, footwear, automobiles and automobile parts, food, household consumer goods, toys, specialty items, textiles, and apparel. AAEI's membership also includes many organizations serving the international trade community, including customs brokers, freight forwarders, banks, attorneys, insurance firms, and carriers.

AAEI is often called upon by Congressional committees to offer its technical expertise on policy and regulatory matters impacting global commerce. The association and its members have an abiding interest in U.S. laws affecting international trade and their adherence to the Constitution. These cases are significant for AAEI because its membership includes companies that have paid Harbor Maintenance Taxes in connection with imports into the United States and/or domestic shipments within the United States, and that have filed lawsuits challenging the constitutionality of such assessments. Those lawsuits are currently pending in the United States Court of International Trade and will be directly affected by the outcome of the *Thomson* and *CF Industries* cases.

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1. Letters from the Petitioners and the Respondent consenting to the filing of this brief accompany this filing. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

The Federal Circuit's holding that the Harbor Maintenance Tax ("HMT") as applied to imports and domestic shipments is a user fee rather than a tax, and therefore beyond the scope of the Uniformity Clause requirement that all "Duties, Imposts and Excises shall be uniform throughout the United States," cannot be reconciled with this Court's earlier holding that the HMT is, in fact, a tax rather a user fee. *See United States v. United States Shoe Corp.*, 523 U.S. 360 (1998) (holding that the HMT is a "tax" on exports that violates the Export Clause of the Constitution, which states, "No Tax or Duty shall be laid on Articles exported from any State").

In *United States Shoe*, this Court recognized that the flexible user fee analysis applicable to implied constitutional limitations on governmental taxing authority, under which an assessment need only be a "fair approximation" of the use of government-provided services in order to qualify as a user fee, does not govern under the Export Clause, which, by virtue of its *express* prohibition against federal taxation of exports, requires that a valid user fee bear a close relationship to the use of government services. This Court held that the HMT as applied to exports is a prohibited tax rather than a valid user fee because it is assessed as a fixed percentage of the value of the cargo shipped, and "[t]he value of export cargo . . . does not correlate reliably with the federal harbor services used or useable by the exporter." 523 U.S. at 369.

The Federal Circuit misinterpreted *United States Shoe* as limiting a strict user fee standard to the Export Clause and endorsing the more permissive "fair approximation" standard for all other constitutional provisions, including the Uniformity Clause. To the contrary, this Court's analysis of the HMT in *United States Shoe* applies equally to other

express restrictions on the federal government's taxing authority, such as the Uniformity Clause. Therefore, the Court should grant the petitions to clarify that the flexible user fee analysis is inapplicable to such express limitations, and that the HMT is indeed a tax.

As a "tax," the HMT is unconstitutional under the Uniformity Clause. The Uniformity Clause requires that a "tax [must] apply, at the same rate, in all portions of the United States where the subject of the tax is found." *United States v. Ptasynski*, 462 U.S. 74, 84 (1983). The subject of the HMT is port use in the United States, which, in turn, is defined as the loading or unloading of commercial cargo from a vessel at a port. However, a variety of HMT exemptions drawn along geographic lines relieve this commercial activity from the tax. These exemptions apply to: (1) domestic cargo unladen in Alaska or Hawaii; (2) all cargo unladen from vessels that are subject to the Inland Waterway Fuel Tax; and (3) all cargo unladen at ports located in inland waterways or along a portion of the Columbia River. As these exemptions allow port use to escape HMT liability, the HMT is unconstitutional under the Uniformity Clause.

The HMT exemptions for domestic cargo unladen in Alaska or Hawaii also run counter to the Port Preference Clause of the Constitution, which states in pertinent part, "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another. . . ." The Federal Circuit upheld the HMT because it found that these exemptions were not intended to provide a preference to the ports of Alaska and Hawaii at the expense of other States' ports. However, the Federal Circuit's novel incorporation of a subjective intent test into the Port Preference Clause is inconsistent with this Court's precedents, which confirm that naked preferences of the sort provided for in the HMT statute are strictly prohibited.

This Court should grant the certiorari petitions in order to preserve the integrity of the Port Preference Clause, which was vitiated by the Federal Circuit's decision.

Finally, the Court should grant the petitions given the economic significance of the issues to the U.S. importing community. The HMT is assessed on virtually all waterborne imports into this country, involving approximately $500 billion in imported merchandise and resulting in approximately $500 million in HMT collections each year. Review by this Court is warranted to rectify this enormous, unconstitutional exaction from importers.

## ARGUMENT

### I. THIS COURT'S CONCLUSION IN *UNITED STATES SHOE* THAT THE HMT IS A "TAX" RATHER THAN A "USER FEE" APPLIES EQUALLY TO THE UNIFORMITY CLAUSE.

The Federal Circuit held that the HMT is a user fee rather than a tax, and therefore not subject to the Uniformity Clause of the Constitution, which mandates that all "Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. *See Thomson multimedia Inc. v. United States* and *CF Industries, Inc. v. United States*, 340 F.3d 1355 (Fed. Cir. 2003) ("*Thomson*"). The Federal Circuit's holding is a striking deviation from this Court's determination in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), that the HMT is a tax rather than a user fee, and thus violative of the Export Clause of the Constitution, which provides that "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5.

The Federal Circuit interpreted *United States Shoe* as limiting, to the Export Clause, a strict standard for determining whether a particular charge is a user fee rather

than a tax, and endorsing a more permissive standard for making that determination in all other constitutional contexts. *See Thomson*, 340 F.3d at 1361 (characterizing *United States Shoe* as having been based on a "different, more stringent standard specific to the Export Clause," and applying "the more flexible *Massachusetts* test" to the Uniformity Clause challenge here).[2]

In doing so, the Federal Circuit fundamentally misinterpreted this Court's decision in *United States Shoe*. Although *United States Shoe* relied upon an earlier Export Clause decision,[3] and distinguished "decisions involv[ing] constitutional provisions other than the Export Clause" which do not expressly limit governmental taxing authority, *id.* at 368, this Court did not suggest that the *Massachusetts* test applies by default everywhere else in the Constitution. Rather, the Court signaled that the applicability of the *Massachusetts* test turns on whether the constitutional provision at issue expressly limits governmental taxing authority. As explained below, because the Uniformity Clause is such an express limitation, the *Massachusetts* test does not apply.

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2. Under the *Massachusetts* test, which this Court formulated in the context of the doctrine of implied State tax immunity, in order to constitute a user fee, a charge must: (1) not discriminate against a constitutionally protected interest; (2) be based upon a "fair approximation" of use; and (3) not be excessive in relation to the cost to the government of the benefits conferred. *Massachusetts v. United States*, 435 U.S. 444 (1978).

3. The Court cited *Pace v. Burgess*, 92 U.S. 372 (1875), as "[t]he guiding precedent for determining what constitutes a bona fide user fee in the Export Clause context." *United States Shoe*, 523 U.S. at 369. *Pace* did not set forth any particular "test" under the Export Clause. Rather, its general analysis "established that, under the Export Clause, the connection between a service the Government renders and the compensation it receives for that service must be closer than is present" in the case of the HMT. 523 U.S. at 369.

In *United States Shoe*, this Court observed that "the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." 523 U.S. at 368. The "other constitutional limitations" which the Court addressed, *i.e.*, the Commerce Clause, the doctrine of implied State tax immunity, and the Takings Clause, lack textually express requirements or, in the case of the Takings Clause, only rarely constrain the federal government's taxing power.[4] Because these clauses therefore impose fewer constraints on taxation than the Export Clause, the "'*text* of [which] . . . *expressly* prohibits Congress from laying any tax or duty on exports,'" *id.* (emphasis added) (quoting *IBM*, 517 U.S. at 852), this Court held that the flexible user fee analysis applicable to those constitutional provisions does not govern under the Export Clause. *Id.* at 368-69.

The Uniformity Clause, which mandates that "all Duties, Imposts and Excises shall be uniform throughout the United States," is, like the Export Clause, a clear textual command that directly restricts the general grant of the taxing power to Congress. Indeed, Justice Story, in his *Commentaries on the Constitution of the United States*, noted that without the

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4. As this Court has noted, the Commerce Clause "does not expressly prohibit the States from doing anything"; rather, the "negative implications of the Clause . . . prevent certain state taxation even when Congress has failed to legislate." *United States v. International Bus. Mach. Corp.*, 517 U.S. 843, 851 n.2 (1996) ("*IBM*"). The Takings Clause, though textually express in its requirement that "nor shall private property be taken for public use, without just compensation," U.S. Const. amend. V, only rarely impacts the taxing power of the federal government. *See, e.g., 287 Corporate Center Assocs. v. Township of Bridgewater*, 101 F.3d 320, 324 n.5 (3d Cir. 1996) ("levying taxes does not rise to the level of a Fifth Amendment taking unless it was so 'arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property. . . .'") (quoting *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916)).

Uniformity Clause, the "value of most of the *other restrictive clauses* in the constitution" would have been "demolish[ed]." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 954, at 428-29 (Boston, Hilliard, Gray and Company 1833) (emphasis added). Recently, one commentator has observed that given their textual similarities, the Uniformity Clause is as strong a limitation on the taxing power as the Export Clause. *See* Eric M. Jensen, *The Export Clause*, 6 Fla. Tax Rev. 1, 72-73 (2003) (comparing the unqualified prohibition of the Export Clause to the Uniformity Clause, which "absolutely prohibits duties, imposts and excises that aren't uniform.").

Given the textual similarities of the Export Clause and the Uniformity Clause, *United States Shoe*'s rejection of the *Massachusetts* "fair approximation" test applies equally to the cases at bar. Thus, the same close relationship between the HMT and the government's harbor maintenance services that was required, but lacking, under the Export Clause in *United States Shoe* is required, but lacking, under the Uniformity Clause. Therefore, *United States Shoe's* holding that the HMT is a "tax" governs the cases at bar.

Just as the HMT imposed on exports was "determined entirely on an ad valorem basis" rather than based on factors reflecting the actual extent and manner of port use, "such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging," *United States Shoe*, 523 U.S. at 369, the HMT is imposed ad valorem on imports and domestic shipments. And, just as "[t]he value of the export cargo . . . does not correlate reliably with the federal harbor services used or useable by the exporter," *id.*, the value of imported or domestically-shipped cargo does not correlate reliably with the cost or value of the harbor services used or useable by companies that import or ship domestically. Notably, the Federal Circuit did not suggest that the harbor services used

by importers or domestic shippers differ from the harbor services used by exporters. Therefore, this Court's conclusion in *United States Shoe* that the HMT does not "fairly match the exporters' use of port services and facilities," 523 U.S. at 370, necessarily controls the cases at bar.

*United States Shoe* reflects this Court's recognition that where the Framers included an express restriction on the federal government's taxing power, that command must be interpreted broadly to ensure that it is given full effect. Thus, given the express restriction on taxation in the Export Clause, this Court was careful "'to guard against . . . the imposition of a [tax] under the pretext of fixing a fee'. . . ." *United States Shoe*, 523 U.S. at 370 (quoting *Pace*, 92 U.S. at 376). Given the similar textual command in the Uniformity Clause that "all Duties, Imposts and Excises shall be uniform throughout the United States," this Court should grant the petitions for certiorari to likewise guard against the federal government's imposition of a *non-uniform* tax under the pretext of fixing a fee.[5]

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5. Even if the Federal Circuit was correct in examining the HMT as applied to imports and domestic shipments under the *Massachusetts* "fair approximation" test, its conclusion that the HMT is a user fee cannot be squared with *United States Shoe*, in which this Court observed that the HMT was not even a "fair approximation of services, facilities, or benefits furnished to the exporters." 523 U.S. at 363. In the export context, the Federal Circuit itself found that "the amount of HMT has *no relationship* to the size or weight of the vessel or the necessary depth of the port required by the vessel." *United States Shoe Corporation v. United States*, 114 F.3d 1564, 1572 (Fed. Cir. 1997) (emphasis added). The calculation of the HMT and the nature of harbor use or services in the import and domestic shipment contexts is no different from the export context.

## II. THE HMT VIOLATES THE UNIFORMITY CLAUSE.

The Uniformity Clause mandates that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. The HMT statute violates the Uniformity Clause by creating a series of exemptions pertaining to goods unladen at ports in Hawaii, Alaska, the inland waterway system, and a portion of the Columbia River.

In *United States v. Ptasynski*, 462 U.S. 74 (1983), this Court reiterated the well-settled rule that under the Uniformity Clause, a "tax [must] apply, at the same rate, in all portions of the United States where the subject of the tax is found." *Id.* at 84; *see also Knowlton v. Moore*, 178 U.S. 41, 84 (1900) ("[W]herever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate."). The HMT statute violates the rule of uniformity because it imposes a tax on commercial activity involving port use, but creates exemptions based on the geographic location where that activity occurs, and on other extraneous considerations.

However, the trial court in these proceedings, the United States Court of International Trade ("CIT"), ruled that it would "invalidate the HMT under the Uniformity Clause only where it finds that Congress' purpose [in creating the exemptions] was to promote regional favoritism or discrimination." *See Thomson multimedia Inc. v. United States*, 219 F. Supp. 2d 1322, 1326 (Ct. Int'l Trade 2002). By substituting a test of subjective intent for the inquiry called for under this Court's precedents, the CIT eviscerated the Uniformity Clause. This Court should therefore grant the certiorari petitions to further delineate the scope of the clause.[6]

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6. The Court should do so even though the Federal Circuit did not address the Uniformity Clause issue given its determination that the HMT is a user fee that is not subject to the clause. For example, in *Carlson v. Green*, 446 U.S. 14 (1980), this Court considered a

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The HMT statute "impose[s] a tax on any port use." 26 U.S.C. § 4461(a). Thus, the subject of the HMT is port use, which, in turn, is defined as the loading or unloading of commercial cargo from a vessel at a port. 26 U.S.C.

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question that was not even presented in the district court because "the interests of judicial administration will be served by addressing the issue on its merits." *Id.* at 17 n.2. The issue in *Carlson* was "squarely presented [to this Court] and fully briefed," and was "an important recurring issue [that was] properly raised in another petition for certiorari being held pending disposition of this case." *Id.* Review of the Uniformity Clause issue is similarly warranted here, where: (i) more than 1,000 cases challenging the HMT as applied to imports or domestic shipments are being held in abeyance by the CIT pending disposition of the instant certiorari petitions; (ii) the issue was fully briefed in both the Federal Circuit and the CIT in *Thomson* and *CF Industries*; and (iii) the CIT issued a detailed decision in *Thomson* (the reasoning of which was incorporated by the CIT in its *CF Industries* decision) upholding the HMT under the Uniformity Clause.

Furthermore, as is evident from the discussion *infra*, a decision by this Court that the HMT exemptions for Alaska and Hawaii violate the Port Preference Clause would also implicate the Uniformity Clause, as it would require invalidation of the HMT on all domestic shipments and thereby result in complete HMT-exemption for the many ports that accommodate domestic shipments only, despite continued port use at those ports. In other words, the Court cannot strike down the HMT on domestic shipments and leave the HMT on imports standing alone; this circumstance would violate the Uniformity Clause because port use — the lading or unlading of commercial cargo — would continue at a number of ports that accommodate domestic shipments only, but such port use would not be subject to the HMT. Compare 19 C.F.R. § 24.24, designating all ports subject to HMT, with 19 C.F.R. § 101.3, listing Customs ports where imported merchandise may be unladen (the former lists more ports because it includes ports that service domestic shipments but not imports). Given the importance of these issues, this Court should grant certiorari on the Uniformity Clause issue and decide the entire case on the merits.

§ 4462(a)(1).[7] However, domestic port use in Hawaii and Alaska is relieved from the tax by means of a "Special rule for Alaska, Hawaii, and possessions," which reads in pertinent part: "No tax shall be imposed under section 4461(a) with respect to [domestic shipments of cargo unloaded in Alaska or Hawaii]." 26 U.S.C. § 4462(b). Thus, the statute unconstitutionally provides that the tax shall not apply despite the existence of the subject of the tax in Hawaii and Alaska.

Similarly, 26 U.S.C. § 4462(c) provides that no tax will be imposed on the unlading of any cargo if, at some point along its itinerary, the vessel becomes subject to the IWFT imposed under 26 U.S.C. § 4042.[8] In other words, there is no HMT liability whenever a cargo vessel's itinerary touches upon some IWFT river. Here, the HMT statute unconstitutionally provides that the tax shall not apply despite the existence of its subject, due solely to an independent taxable event that arises under an entirely different statute. The HMT creates similar geographic exemptions for ports located along inland waterways[9] and a portion of the Columbia River.[10]

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7. As enacted, the HMT statute provided that cargo destined for export from the United States would be taxed upon lading, while all other cargo would be taxed upon unlading. *See* 26 U.S.C. § 4461(c)(2). As this Court's decision in *United States Shoe* invalidated the HMT on exports, the tax is now assessed solely upon the unlading of cargo.

8. The IWFT, imposed under 26 U.S.C. § 4042(b)(2)(A), is assessed at the modest rate of 20 cents per gallon of fuel consumed on the waterway.

9. *See* 26 U.S.C. § 4462(a)(2)(A)(i) (defining "port" as "any channel or harbor . . . in the United States which is not an inland waterway. . . ."). There are 27 inland waterways in the United States. *See* 33 U.S.C. § 1804.

10. *See* 26 U.S.C. § 4462(a)(2)(C) (defining "port" to include the channels of the Columbia River in Oregon and Washington only

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All of these exemptions operate to remove actual port use from the purview of the tax, even though the ports involved require and receive harbor maintenance services funded by revenue generated from HMT assessments. Under these circumstances, none of the exemptions can be squared with this Court's Uniformity Clause precedents.

Stated another way, unlike this Court's decision in the *Head Money Cases*, 112 U.S. 580, 595 (1884), the "evil to be remedied by [the tax] legislation" — navigational impediments in this case — exists at the exempted ports. *See id.* at 594-95 (per capita excise tax on immigrants assessed at water ports but not inland ports did not violate the Uniformity Clause because there was no immigration at inland ports); *see also Ptasynski*, 462 U.S. at 82 (explaining that in *Head Money Cases*, "[t]he tax applied to all ports alike. . . .").[11]

The *Ptasynski* Court also observed that if Congress "frame[s] a tax in geographic terms," courts must "examine the classification closely to see if there is actual geographic discrimination." 462 U.S. at 85. Here, the HMT exemptions create actual geographic discrimination among ports in violation of the Uniformity Clause by encouraging vessels to unlade at HMT-exempt ports, as ports that are subject to the HMT (and which subsidize harbor maintenance at exempt

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up to the downstream side of Bonneville lock and dam, which is located roughly at Columbia River Mile 144). This special rule creates a unique tax immunity covering approximately 47 miles of the Columbia River where neither the HMT nor the IWFT applies. *See* 33 U.S.C. § 1804(8) (providing that the IWFT shall apply at Columbia River Mile 191.5 and points upstream).

11. In *Ptasynski*, the Court also found no Uniformity Clause violation because the exemptions were not drawn along state political lines, a clear distinction with the HMT exemptions for Alaska and Hawaii. *See* 462 U.S. at 78.

ports) are less attractive destinations for commercial cargo. The Port of Bienville in Mississippi illustrates the advantage for inland waterway ports created by the HMT. Bienville is a customs port of entry, situated on the Pearl River a few miles north of the Gulf of Mexico. Because the Pearl River is a designated inland waterway, imported merchandise that is entered at Bienville (or domestic cargo unladen at Bienville) is not subject to the HMT. *See* 19 C.F.R. § 24.24.

Furthermore, the exemption for cargo on vessels subject to the IWFT creates unconstitutional competitive advantages for ports in close proximity to an inland waterway. Shippers of domestic or imported cargo can plan their itineraries so that their vessels traverse a nearby inland waterway before or after unlading, thus incurring a negligible IWFT expense, which negates HMT liability.[12]

Accordingly, the HMT exemptions violate the Uniformity Clause by allowing a variety of port use to escape the tax, and by producing competitive advantages and disadvantages among ports that give rise to actual geographic discrimination.

## III. THE HMT VIOLATES THE PORT PREFERENCE CLAUSE.

The Port Preference Clause provides in pertinent part, "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another. . . ." U.S. Const. art. I, § 9, cl. 6. Had the Federal Circuit abided by this Court's Port Preference Clause precedents, it would have found the preferences contained in 26 U.S.C. § 4462(b), which establish HMT exemptions in

12. In this regard, the Court should take particular note of the port shopping incentives that emanate from the designation of the 1,192 mile Atlantic Intracoastal Waterway, and the 1,134.5 mile Gulf Intracoastal Waterway, as inland waterways. *See* 33 U.S.C. §§ 1804(6) and 1804(11), respectively.

favor of ports in Hawaii and Alaska, unconstitutional. Accordingly, the Court should grant the certiorari petitions in order to preserve the integrity of the Port Preference Clause, which was vitiated by the Federal Circuit's decision.

As the Federal Circuit acknowledged, HMT assessments do not affect each State's commerce in the same way: "[T]he statute explicitly exempts from the HMT domestic cargo (excluding crude oil) either unloaded in Hawaii, Alaska, or U.S. possessions or unloaded in the continental United States and shipped from Alaska, Hawaii, or a U.S. possession. [26 U.S.C.] § 4462(b)." *Thomson*, 340 F.3d at 1357; *see also id.* at 1366 ("It is true that domestic shipments — except for crude oil shipments out of Alaska — that arrive in the ports of [Alaska or Hawaii] will not be subject to HMT liability.").

Despite these naked preferences, the Federal Circuit upheld the HMT because

> the intent and effect of the exemption was not to provide a preference to the ports of the exempted states at the expense of the ports of other states, but rather to provide some relief from the disparate effects the HMT would have had on the shipping-dependent states and possessions.

*Thomson*, 340 F.3d at 1366. Thus, the Federal Circuit looked to the *subjective intent* of Congress in fashioning port preferences and concluded that the clause "prohibits only intentional, effectual preference of the ports of one state over ports of another state, advantaging certain states' ports by disadvantaging other states' ports." *Id.* at 1365. The Federal Circuit's novel interpretation of the Port Preference Clause — the court itself conceded that no case directly supports such an approach (*see id.*) — is inconsistent with this Court's precedents and therefore should be overruled.

In *Knowlton v. Moore*, 178 U.S. 41 (1900), this Court ruled that "[t]he substantial effect of the [Port Preference Clause] . . . was to require that all regulations of commerce or of revenue affecting commerce through the ports of the States should be the same in all ports." *Id.* at 104 (emphasis omitted). Although the Federal Circuit acknowledged that the HMT is assessed differently with respect to ports in Alaska and Hawaii, it failed to cite, let alone distinguish, *Knowlton*. *See Thomson*, 340 F.3d at 1357, 1366. Had the Federal Circuit followed *Knowlton*, it would have been constrained to declare the HMT unconstitutional.

In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855), this Court explained the direct, objective proscription contained in the Port Preference Clause regarding preferences in the form of "privileges or immunities" granted by Congress:

> [T]hese privileges and immunities, whatever they may be in the judgment of congress, shall be common and equal in all the ports of the several States. Thus much is undoubtedly embraced in the prohibition; and it may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular State over those of another. Indeed, the clause, in terms, seems to import a prohibition against some positive legislation by congress to this effect. . . .

59 U.S. at 435. *Wheeling's* ruling that "privileges or immunities" granted by Congress — which terms surely encompass the exemptions at issue here — "shall be common and equal in all the ports of the several States," *id.*, categorically bars the Federal Circuit's position that subjective congressional intent underpins Port Preference Clause analysis.

Contrary to the Federal Circuit's statement that this Court's precedents "do not support the proposition that a statute with explicit exemptions of states to *prevent* disparate effects violates the [Port Preference] Clause," *Thomson*, 340 F.3d at 1364-65, *Wheeling* directs a court to determine simply whether Congress has enacted "some positive legislation" that provides a "direct privilege or preference" for the ports of any particular State. If such an assessment does not apply "common[ly] and equal[ly]" in the ports of each State, it violates the Port Preference Clause. *Wheeling*, 59 U.S. at 435. As the Federal Circuit correctly recognized that HMT assessments do not apply commonly and equally to port use in Alaska and Hawaii, *Wheeling* and *Knowlton* require reversal of its decision.

Moreover, by reading the element of subjective intent into the Port Preference Clause, the Federal Circuit transgressed the inveterate canon of constitutional construction that courts should give effect to the plain meaning of a constitutional prohibition unless doing so would produce an absurd result that is inconsistent with the spirit of the Constitution. As Chief Justice Marshall explained:

> It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. *The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.*

*Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644-45 (1819) (emphasis added).

Thus, even if the Framers of the Port Preference Clause did not contemplate the type of preferences at issue here, the HMT exemptions involving Alaska and Hawaii nevertheless create "preferences" under the plain language of the clause. Moreover, no credible argument can be made that declaring the HMT unconstitutional under the Port Preference Clause would produce an absurd result repugnant to the Constitution. As the Federal Circuit's decision conflicts with the canon of constitutional interpretation announced in *Woodward*, it should be reviewed by this Court.

## IV. THE ISSUES PRESENTED ARE OF GREAT IMPORTANCE TO THE IMPORTING COMMUNITY.

In addition to their significance from a constitutional standpoint, the issues presented are of great economic importance to the United States importing community. Virtually all waterborne import commerce, entering the United States through over 190 ports located in more than 30 States, is subject to the HMT. *See* 19 C.F.R. § 24.24. The HMT applies without regard to the type of product imported or whether the goods are subject to customs duties.

The ad valorem HMT imposes a particular burden on imports, as "[k]ey imports tend to consist of higher value commodities (e.g., electronics, automobiles, etc.). . . ." Department of the Army, Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1999, at 13 (Feb. 2001). Overall, as reported by the Department of Transportation Maritime Administration, the value of waterborne imports in 2001 (the latest year for which statistics are available) exceeded $523 billion[13] and approximately $500 million in HMT is collected from importers each year. The fiscal importance of the issues

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13. *See* U.S. Imports by U.S. Customs District and Port – 2001, *at* http://www.marad.dot.gov/statistics/usfwts/imp2001.htm. (last updated April 23, 2002).

presented in these cases warrants issuance of the writs of certiorari. *See United States v. Hill*, 506 U.S. 546, 549 (1993).

## CONCLUSION

For the foregoing reasons, amicus curiae American Association of Exporters and Importers respectfully urges this Court to grant the petitions for a writ of certiorari.

Respectfully submitted,

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